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Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the omnibus provision of Section 1503, the federal obstruction of justice statute, reaches quintessential litigation-related activities undertaken by a lawyer on behalf of a client, including the filing of a petition for certiorari in this Court, as long as the jury determines that the lawyer acted corruptly, with corruptly defined to mean that defendant should reasonably have seen that the natural and probable consequences of his act was the obstruction of justice.

2. Does the First Amendment permit the conviction of a person for obstruction of justice, based on efforts to persuade a local prosecutor to indict a state official for misconduct in the performance of his duties where the defendant maintains that the misconduct charges were true and the government has not shown otherwise.

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JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on July 31, 1998. (App. 1) A petition for rehearing with suggestion for rehearing en banc was timely filed, and denied by order dated August 24, 1998. (App. 35) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 1503 provides:

Influencing or injuring officer or juror generally

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official

> duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

U.S. Const., Amendment I provides:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The omnibus clause of 18 U.S.C. § 1503, the federal obstruction of justice statute, is among the most powerful tools available to a prosecutor. In this case, it was used to prosecute an attorney who had acted aggressively on behalf of a client. After the prosecutor obtained an indictment and won a conviction against the client, she went after Petitioner, making a deal with the client to testify against his former attorney, and, ultimately, obtaining a conviction. Petitioner is currently serving a prison term of 87 months, justified according to the sentencing court's pronouncement, because Petitioner had "abused the First Amendment." (Sentencing Tr. at 65)

As argued later in this Petition and in an amicus brief filed in the Court of Appeals for the Seventh Circuit, Petitioner's "crimes" and the prosecution's theory of criminal culpability are of grave concern to the criminal defense bar, and should be of concern to all lawyers. Quite simply, Petitioner's crimes consisted of unexceptional litigation-related activities, including the filing of a petition for a writ of certiorari with this Court.

These acts were rendered criminal, according to the prosecution, and according to the Seventh Circuit in affirming the conviction, not because the government proved that the court papers contained false statements (as the indictment had charged), or were improper in some other way, but because the jury could have found that they were filed "corruptly" or "with a corrupt motive." Both "corruptly" and "corrupt motive" were defined so vaguely and broadly that they provide no significant limitation on what may be prosecuted under the omnibus clause, vesting virtually unfettered discretion in prosecutors to go after their adversaries or former adversaries, and providing no rational basis on which courts or juries -- or lawyers -- can distinguish between litigation-related activities that are acts of lawyering (essential to the proper functioning of the adversarial system) and those that are federal felonies.

The charges against Petitioner arose out of the investigation and prosecution of Thomas Venezia. In 1995, following a joint state-federal investigation, Venezia was indicted on federal racketeering charges involving the placement of video poker games on which illegal payouts were made at liquor-selling establishments in Southern Illinois. Petitioner served as Venezia's lawyer during the investigation, and Venezia continued to depend on Petitioner after the racketeering indictment was returned.

Following Venezia's conviction, a new indictment was returned against Venezia and Petitioner, arising out of the investigation and prosecution of the racketeering case. Following recusal of all the local district court judges, the Hon. Stephen N. Limbaugh was brought in to preside over the case.

Count 1 of the new indictment alleged a far-reaching conspiracy to defraud the United States, in which the conspiratorial purposes and acts consisted of alleged obstructions of justice which were also pled as separate substantive counts.

Venezia struck a deal with the government and testified against Petitioner, who was convicted of conspiracy and three counts of obstruction of justice under § 1503's omnibus clause. Two of these obstruction of justice counts, Counts 2 and 7, were premised on the filing of what the indictment called "false pleadings."

Count 2 alleged obstruction of justice in connection with Venezia v. Robinson, a state civil injunction action removed to federal court, brought by Petitioner, as counsel for Venezia, against Bonds Robinson, a state liquor control commission agent. Robinson, who, at some point, began working undercover with the FBI in the investigation of Venezia, had conducted a series of raids at establishments where Venezia had video poker games. In his other undercover role, Robinson sought to catch Venezia offering him money to stop the raids. Petitioner commenced Venezia v. Robinson seeking to enjoin Robinson from harassing Venezia and his customers. Petitioner obtained Robinson's presence at the injunction hearing, and, there, under oath, Robinson disclosed that there was an ongoing investigation and that he was working with the FBI. The state court issued an order, enjoining Robinson from engaging in illegal activities.

When the raids continued, Petitioner sought to enforce the injunction. Robinson, by then represented by the United States Attorney's office, removed the action to federal court, where United States District Judge William Stiehl dissolved the state court injunction. Cueto filed an appeal in the Seventh Circuit, and, after that failed, sought a writ of certiorari in this Court. See Venezia v. Robinson, 16 F.3d 209 (7th Cir.), cert. denied, 513 U.S. 815 (1994).

The specific obstruction of justice in Count 2 was the filing of a "false" brief in the Seventh Circuit Court of Appeals and a "false" petition for a writ of certiorari in this Court. (Indictment at ¶¶ 63-64) The government claimed that the cert.

petition was false in that it stated that Venezia had a legitimate vending business (and did not mention illegal gambling machines) and "attacked the integrity" of the Seventh Circuit judges.

Count 7 charged obstruction based on allegedly "false pleadings" filed in the federal criminal racketeering case against Venezia. While Petitioner was denied a bill of particulars, and it was never entirely clear what the allegedly "false pleadings" underlying this count were, the government's position at trial seemed to be that Petitioner caused an attorney for one of Venezia's co-defendants in the racketeering case to file a motion to recuse Judge Stiehl, the judge who dissolved the state court's injunction and who was assigned to preside over the racketeering case.

Count 6 , which did not involve court filings, but which raises substantial First Amendment questions, also involved Bonds Robinson, the state liquor control officer. This count's operative language charged that Petitioner endeavored to obstruct justice by engaging in acts to "persuade the County State's Attorney [Robert Haida] to indict ... Robinson" on charges of perjury. (Indictment at ¶ 73) This count rested on the fact (undisputed by Petitioner) that, while the appeal to the Seventh Circuit in Venezia v. Robinson was pending and the FBI's investigation of Venezia continued, Petitioner examined Agent Robinson under oath at a suppression hearing in a gambling case arising from a raid on one of Venezia's customers. During his testimony, Robinson denied that he had ever taken a bribe from a certain beer distributor, Tony Joynt. Petitioner, contending (on information and belief) that Robinson had taken money from Joynt, urged State's Attorney Haida to indict Robinson for perjury. Haida commenced an investigation, but did not bring charges against Robinson.

Later, Petitioner announced his own intention to run for Haida's office, and published a newspaper editorial criticizing Haida for his failure to act. According to the government, these acts were undertaken to discredit Robinson, in furtherance of Petitioner's efforts to obstruct justice and defraud the United States. They were an important part of the government's case. However, at trial, the government produced no evidence whatsoever that Robinson had not taken a bribe from Joynt and had not perjured himself in denying it; the government called neither Robinson nor Joynt to testify at Petitioner's trial. The defendant was not allowed to testify about the basis for his belief that Robinson had accepted money from Joynt.

Petitioner moved, pre-trial, to dismiss the indictment insofar as it rested on the filing of court papers or on acts to persuade the local prosecutor to bring charges against Robinson, urging that such conduct was not a crime under § 1503. The district court denied the motion. (App. 36) Accepting the government's arguments, the court held that any act, whether itself legal or not, may be prosecuted under § 1503 if it "obstructs or impedes the due administration of justice" and is undertaken "with a corrupt or improper purpose." (App. 40) Citing United States v. Cintolo, 818 F.2d 980 (1st Cir.), cert. denied, 484 U.S. 913 (1987), the district court held that "otherwise lawful means, even those undertaken by an attorney in the course of representing a client can transgress § 1503 if employed with ... corrupt intent." (App. 41)

At trial, the government's theory was that Petitioner's actions constituted obstruction of justice because Petitioner had a corrupt motive: a financial interest in Venezia's continued criminal conduct. In its case in chief, the government introduced evidence that Petitioner and Venezia were partners in a number of businesses that were themselves legitimate, but in which, the government claimed, Venezia could not have participated but for his gambling revenues. The government also sought to prove

that Petitioner had a direct financial interest, with Venezia, in Club Exposed, an establishment that offered illegal video poker games, and profited from them. Petitioner did not dispute that he and Venezia had interests in a number of legitimate business ventures, but did dispute that he had any interest in Club Exposed. He testified at trial that he did not. The jury was not asked to resolve this dispute.

Having rejected Petitioner's position that the filing of court papers and other litigation-related activities by an attorney could not constitute obstruction of justice, regardless of the actor's motives, the trial court charged the jury that any act may violate § 1503. Consistent with Seventh Circuit law, the jury was instructed that:

> The law prohibiting the obstruction of justice, under Section 1503, is designed to prevent a miscarriage of justice resulting from corrupt methods.
>
> . . .
>
> The due administration of justice refers to the fair, impartial, uncorrupted and unimpeded investigation, prosecution, disposition, or trial of any matter, civil or criminal, in the courts of the United States.
>
> . . .
>
> The key word in the statute is endeavor.
>
> As used in this statute, endeavor means any effort or any act, however, contrived, to obstruct, impede, or interfere with the grand jury or trial proceedings.

> And it is the endeavor which is the gist of the crime. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.
>
> . . .
>
> Corruptly means to act with the purpose of obstructing justice.
>
> The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice.
>
> The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice.
>
> . . .
>
> Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.
>
> The statute reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.
>
> Any means, though lawful in themselves, can cross the line of illegality, if employed with a corrupt motive to hinder the due administration of justice, so long as the means have the capacity to obstruct.

(Tr. Vol. 32 at 67-69)

The jury returned guilty verdicts on the conspiracy to defraud count and on the three obstruction of justice counts described above.

On appeal, Petitioner argued that § 1503 was unconstitutionally vague as applied to the conduct at issue; that the Seventh Circuit's definition of "corruptly" exacerbated the problem; that § 1503 did not cover the filing of briefs or other court papers, even if shown to contain "false" statements; and that the government had not proved that the subject pleadings were in any way false, let alone, false in a material way. With respect to the count charging that Petitioner had tried to persuade the local prosecutor to indict a law enforcement officer, he urged (among other things) that this conduct was constitutionally protected regardless of his motives.

The Court of Appeals affirmed. With respect to the false pleadings counts, it held that the validity of the convictions did not depend on whether the papers contained falsities or were in any other way improper. According to the Court, even wholly proper, well-grounded, and meritorious litigation-related conduct -- what the court called "otherwise legal conduct" -- violates § 1503 if undertaken with an improper or corrupt motive. The Court ruled that the jury's verdict established that the jury found that Petitioner had a corrupt motive. It rejected the constitutional challenge to Count 6 (endeavoring to persuade the local prosecutor to indict Bonds Robinson for perjury), noting that "speech which is false and misleading is not protected by the First Amendment," and holding that the conduct at issue "is not the kind of conduct with even a colorable claim to First Amendment protection." (App. 22, n.11)

REASONS FOR GRANTING THE WRIT

POINT I

THE SEVENTH CIRCUIT'S DECISION, WHICH RENDERS ALL LITIGATION-RELATED ACTIVITY PUNISHABLE UNDER THE OBSTRUCTION OF JUSTICE STATUTE IF UNDERTAKEN WITH A CORRUPT MOTIVE, IMPERILS THE CRIMINAL JUSTICE SYSTEM

The Seventh Circuit has held that any lawyer who undertakes legitimate, litigation-related steps on his client's behalf may properly be found guilty of obstruction of justice (and conspiracy to defraud the United States) if his acts allow the client to continue a criminal enterprise or the client is engaged in criminal activity from which the lawyer may indirectly benefit. According to the Seventh Circuit, because of the limited nature of appellate review, federal appeals courts are powerless to reverse such a conviction. The opinion of the Seventh Circuit states repeatedly that legitimate lawyering becomes criminal when undertaken "corruptly," "with corrupt intent," or as part of a "corrupt endeavor." Under that decision, a corrupt endeavor can be found by a jury if the endeavor "protects" an illegal practice or safeguards the lawyer's own financial interest.

Under the Seventh Circuit's decision, most lawyers (and virtually all who practice criminal law) are subject to indictment and conviction. No protection is available from the reviewing court. Only the unreviewable exercise of prosecutorial discretion protects honest lawyers from being lumped together with those perceived by prosecutors to be corrupt. Whether government lawyers have unbounded discretion to prosecute their own adversaries, and whether the court has any power (or obligation) to redress prosecutorial overreaching, are at issue in this case.

Section 1503, which is set out in full supra at 1-2, was described by Justice Rehnquist in United States v. Aguilar:

> [F]irst, it proscribes persons from endeavoring to influence, intimidate, or impede grand or petit jurors or court officers in the discharge of their duties; it then prohibits injuring grand or petit jurors in their person or property because of any verdict or indictment rendered by them; it then prohibits injury of any court officer, commissioner, or similar officer on account of the performance of their official duties; finally the "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice.

515 U.S. 593, 598 (1995).

The Circuits are in general agreement as to the elements of the offense proscribed by the omnibus clause. First, the government must prove that there was a pending judicial proceeding. Second, the defendant must have known that the proceeding was pending. Finally, the government must show that the defendant corruptly endeavored to influence, obstruct or impede the due administration of justice. See e.g., United States v. Morvis, 178 F.3d 376, 387 (6th Cir. 1997), cert. denied, 119 S. Ct. 67 (1998); United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989). It is this third element that is at issue in this case. As Justice Scalia noted in his concurring and dissenting opinion in Aguilar, the omnibus clause and the "endeavors" it proscribes have been given a "generous reading." Id. at 609.

The Seventh Circuit has read the clause to proscribe an expansive category of conduct and to reach any act – lawful or

not – that may interfere with the judicial process. That court is not alone. The Fifth Circuit recently described the reach of the omnibus clause as follows: "Obstruction of justice involves any attempt to impede the due administration of justice." United States v. Cihak, 137 F.3d 252, 262 (5th Cir. 1998).

Aguilar, of course, noted that there do exist "metes and bounds on the very broad language" of the provision, and itself established a limiting principle: a required "nexus in time, causation or logic" between the defendant's acts and judicial proceedings that are pending. 515 U.S. at 599. However, neither the Aguilar rule, nor the requirement that the government prove that there was a pending judicial proceeding of which the defendant had knowledge, see, e.g., United States v. Monus, 128 F.3d 376, 387 (6th Cir. 1997), cert. denied, 1998 WL 334064 (Oct. 5, 1998), operates as a significant limiting principle where the acts of lawyers, undertaken in the course of litigation, are concerned. Such acts will almost always have a nexus to a known and pending judicial proceeding.

Still, Petitioner submits the omnibus clause cannot properly be read to criminalize all endeavors "to influence ... the due administration of justice" which have the required nexus. Most of what lawyers do are attempts to influence the justice system, and to affect the outcome of particular proceedings.

Where conduct that is not itself a crime is concerned, the limiting principle separating lawful from criminal activity is, theoretically, provided by the "intent" requirement. Only endeavors that are undertaken "corruptly" violate the statute. But, as this case shows, "corruptly" is itself difficult to define with precision, and the federal courts have had great difficulty defining it.[1]

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[1] This Court has noted the difficulties in defining "corruption" in the context of municipal corporations antitrust

The Seventh Circuit has said that "corruptly" means "with the purpose of obstructing justice." United States v. Machi, 811 F.2d 991, 996 (7th Cir. 1987). However, the gloss the Seventh Circuit has placed on this already rather circular definition eliminates whatever limitation it might be thought to provide. The Seventh Circuit has held that a defendant acts corruptly even where the purpose to obstruct justice is not the defendant's only or even main purpose.

In the Seventh Circuit, the requirement is met when the government shows that the defendant "should have reasonably seen" that obstruction of justice was the "natural and probable consequence of his act." Machi, 811 F.2d at 996. See also

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immunity. The Court rejected the argument that

> ... "conspiracy" might be limited to instances of governmental "corruption," defined variously as "abandonment of public responsibilities to private interests," ... "corrupt or bad faith decisions," ... and "selfish or corrupt motives." ... Ultimately, [the respondent] asks us not to define "corruption" at all, but simply to leave that task to the jury: "[a]t bottom, however, it was within the jury's province to determine what constituted corrpution of the governmental process in their community." ...
>
> A conspiracy exception narrowed along such vague lines is ... impractical. Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt."

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 376-77 (1991).

United States v. Sagit, 991 F.2d 702, 713 (11th Cir.), cert. denied, 510 U.S. 950 (1993) (government is not required to prove that a defendant had the specific purpose of obstructing justice, but it must establish that the conduct was motivated, at least in part, by "a corrupt motive"). This takes Aguilar's "natural and probable effect" language -- which was designed to limit the conduct proscribed by the omnibus clause -- and makes it an aspect of the intent element in a way that dramatically expands the circumstances in which the defendant can be found to have the requisite intent. In any event, Petitioner's jury was so charged.

Where the defendant is a lawyer who has engaged in litigation-related conduct on behalf of a client, these definitions lead to startling results. A lawyer who acts for a client, even for an appropriate purpose and using wholly lawful means, will have acted "corruptly" if he should reasonably have foreseen that the natural and probable consequences of his act was the obstruction of justice. Since obstruction of justice is used as a shorthand for the phrase "influence ... the due administration of justice," this would cover most acts undertaken by lawyers.[2]

Where such standards are applied by juries to the conduct of attorneys, especially criminal defense attorneys, the dangers are patent. Jurors do not easily accept the function of criminal defense lawyers, much of whose work is directed at avoiding indictment or conviction of their clients, including those who are guilty and who do (unfortunately) go on to commit other crimes. To be sure, where a guilty client goes unpunished, defense attorneys have, in a sense, frustrated, impeded, or "obstructed" the administration of justice. But that is their function. The system cannot operate if attorneys' conduct is subject to scrutiny by their adversaries and determined by juries to be either the

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[2] Case law does not address what the "due administration of justice" is or how it differs from the administration of justice, or justice itself.

practice or criminal law or a serious federal felony depending upon a jury's unguided, post hoc assessment of the attorneys's motives.

As the National Association of Criminal Defense Lawyers argued in the amicus brief it filed below, criminalizing even litigation-related misconduct under the omnibus clause will chill vigorous advocacy and destroy the delicate balance between prosecution and defense. Criminalizing litigation-related conduct whose only impropriety lies in the actor's motives poses even greater dangers.[3]

The Seventh Circuit appears to recognize these concerns, but states that its decision is a limited one, and will not affect honest members of the bar. But, the decision's language is not limited, and the factors which supposedly distinguish this case from others provide no real bounds. The court repeatedly states that Petitioner's conviction is valid because there was evidence

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[3] The Seventh Circuit acknowledged that the policy concerns articulated by NACDL were "valid," but professed itself concerned about what it called "the flipside." "If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law." (App. at 18)

The Seventh Circuit failed to appreciate that this is not an either/or situation. A variety of means exist to punish attorneys for litigation-related misconduct, including various forms of attorney discipline under the Code of Professional Responsibility; contempt sanctions under Fed. R. Crim. Pro. R. 42 and 18 U.S.C. § 401; prosecutions for perjury, subornation of perjury, witness tampering, or making false declarations; or prosecution under the three specific provisions of § 1503.

from which the jury could have found that his purpose was "to protect the illegal gambling operation." (App. 17, 27) The jury, however, was never asked to decide that question. And, Petitioner had no real chance to defend against the charges that Venezia's conduct was illegal. The district court ruled, early on, that Petitioner could not "collaterally attack" court rulings made in proceedings that Petitioner was alleged to have obstructed justice in. Thus, he was not permitted to challenge Venezia's racketeering conviction, which, pursuant to Venezia's deal with the government, was not appealed. Equally important, and putting that problem aside, lawyers who have represented clients whose activities are later adjudicated to be criminal always can be said to have acted "to protect" illegal conduct; there is no substantial difference between "defending" and "protecting," certainly not one that jurors are likely to discern.

The Court of Appeals' alternative rationale -- that there was evidence from which the jury could have found that Petitioner acted to "safeguard his personal financial interest" (App. 21) -- is equally dangerous. If a lawyer's desire to "safeguard his personal financial interest" supplies a corrupt motive, then virtually all attorneys must be felons. Many lawyers, including those who work for Wall Street and white shoe firms, have financial interests in common with their clients; they often serve on the boards of, or hold stock in, companies they represent. Every lawyer who defends a forfeiture case or knows she will collect her full fee only if she succeeds in keeping her client out of jail has financial interests to safeguard. Lawyers in general have a financial stake in obtaining good results for their clients, because good results can translate into more business and more money.

The Seventh Circuit intimates that Petitioner's conviction is valid, not because of his financial motives, but because there was evidence that he was involved in his client's gambling activities and was himself a participant in those uncharged

crimes. But even that reading of the decision provides no real protection from overreaching in this or future cases.

If a lawyer is charged with substantive crimes, together with obstruction of justice, he at least has an opportunity to defend against the charges. Where, as here, no substantive crime is charged, no such opportunity exists. The Seventh Circuit itself acknowledged that the prosecution theory, and its failure to charge Petitioner in the underlying gambling/racketeering case, gave it "some pause," but determined that it was ultimately "inconsequential." (App. 16-17, n.10) It was hardly inconsequential. Affirmance of his conviction appears to rest on the premise that Petitioner did participate in the underlying gambling activity, though Petitioner had no chance to defend against those uncharged crimes, and the jury was never asked to decide that question.

The Seventh Circuit suggests that attorneys who have only "good" motives need not worry. In fact, all must feel uneasy. Defense attorneys, especially those who do their jobs creatively and aggressively, and who do not shy away from challenging authority, often get under the skin of prosecutors whom they oppose. Where such activity is undertaken on behalf of a client who is in fact guilty of a crime, prosecutors may truly come to believe that the attorney is endeavoring to obstruct justice and that justice will be done only if the attorney is also punished. The government's charging powers are immense; its ability to charge conspiracy or racketeering predicated on obstruction of justice raises the ante, and affords numerous procedural advantages. To make its case, the government can offer powerful incentives under § 5K1.1 of the Sentencing Guidelines to convince defendants to turn against their attorneys. Defendants -- especially those like Petitioner's client who are facing lengthy sentences -- have powerful reasons to turn. The relationship of trust that must exist for the attorney-client relationship to function properly cannot thrive in such a climate.

The criminal justice system and the defendants who pass through it will be the real losers. As Justice Scalia has warned, the threat of prosecution is enough to affect, in subtle and not-so-subtle ways, the quality and vigor of counsel's advocacy. In discussing why the former version of 18 U.S.C. § 1001 did not reach false statements made in the course of judicial proceedings, Justice Scalia recognized the

> serious concern that the threat of criminal prosecution under the capacious provisions of § 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution

Hubbard v. United States, 514 U.S. 695, 717 (1995) (Scalia, J., concurring) (emphasis added).[4] That threat is greater under the even more capacious provisions of the omnibus obstruction of justice clause.

The criminal justice system cannot function properly if attorneys are at risk of criminal prosecution for otherwise wholly lawful conduct, including the filing of briefs, whenever their motives may be questioned. This case makes clear that some aspect of the equation must change -- whether it be a more limited definition of the acts which may constitute an endeavor to obstruct justice to exclude litigation related activities by lawyers, a more focused definition of the necessary mens rea, or

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[4] Although Congress has amended § 1001 to cover statement to "the judicial branch," it expressly exempted "a party to a judicial proceeding, or that party's counsel for statements, representations, writings, or documents submitted by such party or counsel to a judge or magistrate in that proceeding." 18 U.S.C. § 1001 (b) (1996) (emphasis added).

-- at the very least -- an expansion of the appeals courts' powers of review in cases of this sort. Otherwise the obstruction of justice statute threatens to seriously undermine the very adversarial system that it is ostensibly designed to safeguard.

POINT II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE FIRST AMENDMENT PLACES ANY LIMITATIONS ON AN OBSTRUCTION OF JUSTICE PROSECUTION BASED ON A CITIZEN'S EFFORTS TO PERSUADE A LOCAL PROSECUTOR TO INDICT A STATE LAW ENFORCEMENT OFFICER FOR MISCONDUCT IN THE PERFORMANCE OF HIS DUTIES AND THE PUBLICATION OF AN EDITORIAL ON THAT SUBJECT

The omnibus clause of the obstruction of justice statute, read to cover any "corrupt endeavor" to obstruct justice, may arguably bring within its sweep many acts thought to enjoy First Amendment protection. Indeed, this case involves a laundry list of acts and activities which have long been thought to lie at the very core of the First Amendment: complaining to authorities about government misconduct, instituting lawsuits and taking appeals, publishing newspaper editorials, and running for public office.

Petitioner stands convicted of "engaging in acts to persuade the St. Clair County States Attorney [Robert Haida] to indict Agent [Bonds] Robinson" (Indictment, ¶ 73), that is, petitioning a government official to take official action. The government claimed that Robinson did not perjure himself, but introduced no evidence whatsoever that Petitioner's complaint about Robinson was untrue, let alone that it was made with

knowledge that it was baseless. Rather, it was the government's theory that, regardless of the merits of Petitioner's accusation against Robinson, it constituted obstruction of justice because it was an attack on Robinson's integrity, undertaken "corruptly" to render Robinson ineffectual in the investigation of Venezia, or to discredit him as a potential witness against Venezia.

Petitioner urged at trial, and argued on appeal, that the government had not adduced any evidence that Petitioner's complaint about Robinson lacked merit, and that the trial court improperly foreclosed him from introducing evidence showing the basis for his belief that the complaint was well-founded. He also urged that the conduct charged was protected by the speech and petition clauses of the First Amendment, regardless of the existence of any improper or corrupt motive.

The Court of Appeals did not address Petitioner's claim that the conviction could not stand because the government had not proved that the charge against Robinson unfounded. The Court did expressly reject the constitutional argument, concluding that "Petitioner's conduct is not the kind of conduct with even a colorable claim to First Amendment protection." In explaining this ruling, it declared:

> Speech which is false and misleading is not protected by the First Amendment's right to freedom of speech. Herbert v. Lando, 441 U.S. 153, 171 (1979); United States v. Walton, 36 F.3d 32, 35 (7th Cir. 1994). Just as false statements are not immunized by the First Amendment, meritless litigation based on false accusations and criminal intentions does not fall within the scope of protected speech and "is not immunized by the First Amendment's right to petition." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983).

(App. 22, n.11)

It is axiomatic, however, that even speech that is false and misleading enjoys substantial constitutional protection.[5] And the kind of speech here at issue -- not commercial speech but speech criticizing the conduct of a law enforcement agent and calling for official action against him -- is the kind of speech that enjoys the greatest constitutional protection of all. After all:

> erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the "breathing space" that they "need ... to survive."

New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964) (citations omitted).

Moreover,

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker.

Id. at 241 (citations omitted). "[T]o insure ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

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[5] Indeed, in Bill Johnson's Restaurants, Inc., this Court, recognizing First Amendment concerns, held that the NLRB could not enjoin as an unfair labor practice a suit brought against an employee for a retaliatory motive unless the suit was also shown to be baseless or frivolous.

These First Amendment principles apply equally where the conduct at issue involves petitioning the government for redress of grievances. "Although the right to petition and the right to free speech are separate guarantees, they are generally subject to the same constitutional analysis." Wayte v. United States, 470 U.S. 598, 610, n.11 (1985).

The Court of Appeals held that the conduct "is not the kind of conduct" entitled to First Amendment protection, presumably on the ground that it was undertaken "corruptly" to obstruct justice. But government examination of a speaker's motives itself raises serious constitutional questions. Given the conduct at issue here, whatever Petitioner's motives, they cannot remove the constitutional protection that his conduct enjoyed. "It is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, ... the addition of a personal motive should not result in liability for performing a public obligation." Prosser, Torts, Malicious Prosecution, § 119.

The decision of the Seventh Circuit stands in direct conflict with a decision of the Fifth Circuit on this point. In United States v. Hylton, 710 F.2d 1106 (5th Cir. 1983), the defendant was charged with corruptly endeavoring to impede IRS agents under a statute proscribing "endeavors to obstruct or impede the due administration of [the tax code]." The charge was based on defendant's having instituted criminal trespass complaints against agents who had entered her property in search of her son. The trial court threw out the jury's conviction, ruling that the conduct was protected by the First Amendment. The Fifth Circuit affirmed. It held that, regardless of defendant's motives, her conduct -- filing a criminal complaint with local authorities against federal agents on grounds that state law recognized -- was an exercise of the right to petition for redress of grievances, protected by the First Amendment, even if her complaint challenged conduct that was privileged under federal law. Hylton, 710 F.2d at 1111. The Fifth Circuit squarely held

that Hylton's motivation -- her desire to impede the IRS investigation of her son -- was irrelevant; it did not remove the constitutional protection. Id. at 1112.

The additional conduct alleged in this case, including the seeking of political office, and the publication of a newspaper editorial critical of officials and their official acts, is no less entitled to constitutional protection. Cf. Buckley v. Valeo, 424 U.S. 1, 37, 54 (1976). People (including lawyers) seek office, disseminate political opinions, bring charges and defend against them for all sorts of reasons. Our constitutional system does not permit inquiry into what those reasons are, or permit prosecution for obstruction of justice if selfish or political motives can be discerned.

These rules lose none of their force because the criminal justice system is involved. In these contexts, the First Amendment interests are especially strong. As Justice Kennedy, writing for himself and three other Justices, has said:

> "[T]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." [Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).]
>
> Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, see Nebraska Press Assn. v. Stuart, 427 U.S. 539 606 ... (1976) (Brennan, J., concurring in judgment) ("Commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern"), or where, as is also the present circumstance, the criticism questions the

> judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process, see Morrison v. Olson, 487 U.S. 654, 727-28 ... (1988) (Scalia, J., dissenting). The public has an interest in its responsible exercise.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035-36 (1991).

The Seventh Circuit's First Amendment ruling, that Petitioner's conduct "is not the kind of conduct with even a colorable claim to First Amendment protection" (App. 22, n.11), grossly misperceives the scope of the First Amendment's protections. If permitted to stand, it will chill the exercise of important First Amendment rights.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

In the
United States Court of Appeals
For the Seventh Circuit

No. 97-3439

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AMIEL CUETO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 96 CR 30070—**Stephen N. Limbaugh**, *Judge.*

ARGUED MAY 11, 1998—DECIDED JULY 31, 1998

Before BAUER, FLAUM, and MANION, *Circuit Judges.*

BAUER, *Circuit Judge.* After a jury trial, Amiel Cueto was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts of obstruction of justice, in violation of the omnibus clause of 18 U.S.C. § 1503. The district court sentenced Cueto to 87 months imprisonment and imposed monetary penalties. Cueto now appeals his convictions and sentence, arguing that: (1) the conviction for conspiracy to defraud is invalid because of constitutional infirmities as well as insufficiency of the evidence; (2) the convictions for obstruction of justice are also invalid because of constitutional infirmities and insufficiency of the evidence; (3) he is entitled to a new trial because the district court errone-

ously excluded certain defense evidence; and (4) his sentence should be vacated and remanded because the district court erroneously calculated his sentence. For the following reasons, we affirm.

BACKGROUND

Thomas Venezia owned B&H Vending/Ace Music Corporation ("B&H"), a vending and amusement business, and operated an illegal video gambling business through a pattern of racketeering activities and illegal gambling payouts, in violation of state and federal anti-gambling and racketeering laws. Venezia hired Amiel Cueto, an attorney, to represent him as well as to defend the tavern owners associated with B&H in the event of any arrests and/or criminal charges for their participation in the illegal gambling operation. In March of 1995, Venezia and B&H were indicted on federal racketeering charges, in addition to other related charges including illegal gambling.[1] Throughout the investigation and prior to Venezia's indictment, Cueto served as Venezia's lawyer and advisor. Cueto was not Venezia's attorney of record during the trial; nonetheless, the record indicates that Venezia continued to rely on Cueto's advice throughout the prosecution of the racketeering case.

On December 2, 1995, Venezia and B&H were convicted of racketeering, illegal gambling, and conspiracy arising out of the operation of the illegal gambling business. *United States v. B&H Vending/Ace Music Corp. & Thomas Venezia, et al.*, No. 95-30024. Seven months later, another federal grand jury returned a second indictment naming

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[1] The charges alleged that B&H supplied video poker games to various liquor-selling establishments on which the tavern owners provided illegal gambling payouts to its customers. B&H then reimbursed the tavern owners for the money they paid out on the video games and shared with the owners any profits the games earned.

Cueto, Venezia, and Robert Romanik, a local public official and investigator who worked for Cueto and Venezia. They were charged with, *inter alia*: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and (2) obstruction of justice, in violation of the omnibus clause of 18 U.S.C. § 1503, for their conduct throughout the investigation of Venezia and his illegal gambling operation and the indictment and prosecution of the racketeering case. This second indictment is the impetus for the current appeal.

To understand the context of the instant indictment, convictions, and appeal, we examine the nature and scope of Cueto's relationship with Venezia, his association with the illegal gambling operation, and his involvement in the investigation, indictment, and prosecution of Venezia, the illegal gambling operation, and the racketeering enterprise. In 1987, Venezia purchased a vending and amusement business, later known as B&H, which operated an illegal video gambling business for about eight years. B&H supplied video poker games to local bars in the metropolitan area of East St. Louis, Illinois, including a Veterans of Foreign Wars Post ("VFW") on Scott Air Force Base, and the tavern owners agreed to make illegal gambling payouts to its customers.[2] State agents believed the video games were being used for illegal gambling purposes, and beginning in 1992, the Illinois Liquor Control Commission ("ILCC") and the State Police initiated a joint investigation in St. Clair County, which targeted illegal gambling operations in Southern Illinois.

The ILCC has broad investigatory powers to supervise liquor licensees, and ILCC Agent Bonds Robinson worked on the task force and investigated the gambling operations in cooperation with the state police. Initially, Robinson

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[2] Video games that swallow pocket change and "pay off" in game replays are unobjectionable; but if the owner of an establishment pays winners in cash or liquor, then it is a violation of Illinois anti-gambling laws.

worked in a non-undercover capacity as part of the state investigation to determine, in the course of routine liquor inspections, whether any establishment was making illegal gambling payouts. Agents of the ILCC began to strictly enforce the gambling regulations and frequently visited the taverns to ensure compliance. Eventually, the FBI became interested in the state's investigation, and ultimately decided to use Robinson in a federal investigation of illegal gambling operations in St. Clair County, particularly Venezia's gambling operation.[3] At some later point, Robinson assumed an undercover role for the FBI as a corrupt liquor agent in an attempt to gather evidence against Venezia and B&H. Soon thereafter, the state police raided the VFW Post, seized B&H's video poker games, and arrested two VFW employees for maintaining an illegal gambling establishment. After the raid, Venezia and B&H supplied additional video games to the VFW, which continued to provide its customers with illegal gambling payouts.

In an attempt to gather evidence Robinson, who was present at the VFW raid, indicated that Venezia could avoid further interruptions of his illegal gambling operation if he were to offer a bribe to discourage the investigation and the interference, and he suggested to Venezia that they meet. Venezia consulted with Cueto, who instructed Venezia to meet with Tom Daley, one of his law partners at the time. In an attempt to portray Robinson as a dishonest agent, Daley reported to the ILCC that Robinson had solicited a bribe at the VFW. A meeting was then scheduled between Venezia and Robinson, who met at B&H corporate headquarters. Robinson taped the conversation at the FBI's request, and the tape was introduced into

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[3] When the FBI decided to use Robinson in its investigation of the illegal gambling operations, he was already working for the FBI in an undercover capacity in an unrelated investigation involving illegal prostitution and racketeering.

evidence in the racketeering case and at Cueto's trial.[4] Soon after the meeting, the VFW was raided again; B&H video poker games were seized, and two employees were arrested. The ILCC issued an administrative violation to the VFW as well as a warning to remove the illegal gambling machines, otherwise, its liquor license would be revoked. Again, Venezia consulted with Cueto about the raids, the criminal charges, and the prosecutions, and they discussed available options and courses of action.

First, Cueto and Venezia drafted a letter, detailing Robinson's alleged "corrupt" conduct and accusing him of soliciting bribes, and delivered it to St. Clair County State's Attorney Robert Haida. Cueto also filed a complaint in state court against Robinson, in which Cueto alleged that Robinson was a corrupt agent. *See Venezia v. Robinson*, No. 92-CH 299. Cueto obtained a court order that required Robinson to appear for a hearing in *People v. Moore*, one of the gambling prosecutions arising from the VFW raid.[5] Pursuant to the order, Robinson appeared in state court, and Cueto immediately served him with a subpoena, which required him to appear in court within fifteen minutes for an injunction hearing in *Venezia v. Robinson*. Cueto had prepared a petition, requesting either a temporary restraining order or a preliminary and permanent injunction against alleged extortion and other vexation to prevent Robinson from interfering with the operation of Venezia's business. Robinson had not seen a copy of the complaint, had not been served with process, and was not represented by counsel.

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[4] Of course, the defendant and the government have conflicting opinions about the substance of the conversation and whether a bribe was solicited for investigatory or criminal purposes.

[5] At trial, Cueto admitted that he obtained the court order for unlawful purposes and that he fraudulently used the court order to lure Robinson to court for the injunction proceedings. *See* Trial Transcript, Volume 27 at 72-73, 95 (hereinafter all references to the transcript of the trial are cited as "Transcript, Volume: Page").

At the hearing, Robinson's requests for an attorney were denied, and the state court judge permitted Cueto to question Robinson about the FBI's investigation (which at that point was still a covert operation) and the evidence it had obtained in the course of the investigation. Without permitting Robinson to put on a defense and without articulating any findings of fact or conclusions of law, the state court entered a preliminary injunction against Robinson, which indefinitely enjoined him from interfering with Venezia's business operations. Venezia then returned to the VFW, as well as other taverns affiliated with the gambling operation, to advise them that a state court judge had entered an injunction against Robinson and that he could no longer interfere with their establishments and the illegal gambling operation.

Notwithstanding the injunction and pursuant to instructions from the Director of ILCC to continue his routine liquor inspections, Robinson visited another establishment associated with B&H's gambling operation and discovered that the tavern owner was providing illegal gambling payouts on some of the video machines. Thereafter, Dorothy McCaw was arrested for operating and maintaining an illegal gambling establishment, and she signed a written confession for her participation in illegal gambling activities. Upon learning of the inspection and arrest, Venezia contacted Cueto, who arranged for Venezia and Romanik, the third individual charged in the instant indictment, to obtain another statement from McCaw. Cueto then drafted a letter to the ILCC, State's Attorney Haida, the Office of the United States Attorney for the Southern District of Illinois, and the FBI, claiming that his client was suffering damage as a result of Robinson's "unlawful" interference with the operation of Venezia's business and threatened that if the conduct continued, he would file suit against the ILCC, in addition to Robinson, for damages incurred. Without McCaw's knowledge, Cueto attached to that letter the statement she had given to Venezia and Romanik, which supported Cueto's allegations of interference. Cueto also

filed a rule to show cause in state court, which described Robinson's violations of the injunction and requested the court to find him in contempt; McCaw's statement also was attached to the rule to show cause, again without her knowledge.

Represented by the Office of the United States Attorney for the Southern District of Illinois, Robinson filed a motion to remove the rule to show cause in *Venezia v. Robinson* to federal district court pursuant to 28 U.S.C. § 1442(a)(1). In the removal proceeding, the district court determined that Robinson had been working for the FBI under the control of a federal agent during the VFW raids, which therefore established federal jurisdiction. After removal, the district court dissolved the injunction and dismissed the complaint. *Venezia v. Robinson*, No. 92 CV 867. Cueto filed an appeal in this court, challenging the dissolution of the injunction and the dismissal of the complaint. Recognizing that the injunction hearing had violated Robinson's rights to due process, we affirmed the district court's order. *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994). Cueto filed a petition for certiorari in the Supreme Court, which also was denied. *See* 513 U.S. 815 (1994).

During the investigation, the record indicates that Cueto and Venezia developed more than a professional attorney-client relationship, entering into various financial transactions and business deals, some of which involved secret partnerships. A few examples include: (1) they purchased unimproved real estate, developed the real estate, built and managed a topless nightclub (Club Exposed), which operated some of B&H's illegal gambling machines; (2) Venezia and Cueto incorporated Millennium III, an asbestos removal company, and applied for and obtained a $600,000 line of credit to complete the purchase acquisition; and (3) Venezia purchased Cueto's office building and moved B&H corporate headquarters into it. The record demonstrates that in order to obtain financing, Venezia reported B&H as a principal asset on his financial statements and loan applications to establish the necessary

credit he and Cueto needed to become joint borrowers on various loans. Moreover, the record indicates that the lender in the Millennium purchase relied upon Venezia's financial statement in its decision to loan the money for the acquisition. *See* Transcript, 19:112-113.

About the time the Millennium purchase was finalized, state police and Robinson arrested George Vogt, a B&H customer, for gambling. At a hearing in the state's prosecution of Vogt, Robinson testified and Cueto cross-examined him. After the hearing, Cueto again approached State's Attorney Haida, provided him with the transcripts from the *Vogt* hearing, and urged Haida to indict Robinson for perjury. Thereafter, Haida commenced an investigation of Robinson's activities. Nothing came of Cueto's allegations of perjury, and the investigation ended without any charges being filed.

The investigation of Venezia and B&H began in early 1992, and the events discussed above occurred over a period of approximately three years. We briefly mentioned some of the initial business and financial dealings between Venezia and Cueto, but to avoid an even longer discussion of these background facts, we think it unnecessary to specifically discuss every financial transaction contained in the record except to point out that together Venezia and Cueto participated in various business transactions, in which millions of dollars exchanged hands to finance the purchases of various real estate interests and construction costs relating to various development projects, including certain gambling operations.[6] The indictment specifically charged that Club Exposed, the nightclub owned by Venezia and Cueto, Millennium III, as well as other business transactions in which they were involved, depended upon the continued operation of B&H and the illegal

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[6] The government submitted a summary exhibit of the joint business transactions engaged in by Venezia and Cueto from 1991 until 1995. *See* Trial Exhibit # 276.

gambling business to secure and to cover the various loans and debts they incurred in their financial ventures.

Even after Cueto became a business partner of Venezia and invested in various real estate and development projects with him, he continued to give Venezia legal advice. Although Cueto was not an attorney of record, he participated in the preparation of Venezia's defense in the racketeering prosecution. Cueto continued to urge State's Attorney Haida to indict Robinson for perjury. He also contacted Congressman Jerry Costello, who owned an equal one-third partnership interest in a gambling development project with Cueto and Venezia, and asked the Congressman to contact Haida and to offer him a seat on the judiciary in exchange for Haida's recommendation that Cueto be appointed as the next State's Attorney. Cueto also began to publish a newspaper, the *East Side Review,* and authored an article in which he indicated that in the next election he intended to run for St. Clair County State's Attorney, and in the event he was elected, he would prosecute Robinson.[7]

In August of 1994, the government empaneled a grand jury to examine the evidence obtained in the FBI's investigation of Venezia and B&H, and the grand jury also initiated its own investigation of these allegations. In response, Cueto prepared and filed various motions to hinder the investigation and to discharge the grand jury, all of which were denied. Notwithstanding the defense tactics and delays, the grand jury indicted Venezia, among others; he was prosecuted, and ultimately, convicted for operating an illegal gambling enterprise, in addition to other related convictions.

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[7] In the *East Side Review*, Cueto also authored and published various articles in which he complained of prosecutorial misconduct in association with the racketeering case and attacked the integrity and reputations of various Assistant United States Attorneys involved in the indictment and prosecution of the racketeering case.

Seven months after the racketeering convictions in July of 1996, another grand jury returned a separate nine count indictment against Cueto, Venezia, and Romanik. It is this indictment and the subsequent convictions on various counts of this indictment that are the subject of this appeal.[8] Count 1 of the indictment charged Cueto in a three-part conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, alleging that he misused his office as an attorney and unlawfully and intentionally conspired with Venezia and Romanik to impede, impair, obstruct, and defeat the lawful function of the FBI, the grand jury, and the federal district court in connection with the investigation, indictment, and prosecution of Venezia, B&H, and the illegal gambling operation and racketeering enterprise. The indictment alleged that Cueto and Venezia's business relationship created Cueto's financial motive for his participation in the conspiracy, in which he endeavored to protect the illegal gambling enterprise and to maintain its continued operation in order to safeguard his personal financial interests.

In the first part of the conspiracy, the government charged that Cueto conspired to impede and delay the FBI investigation primarily by attacking the reputation of ILCC Agent Bonds Robinson and by urging the St. Clair County State's Attorney to investigate, indict, and prosecute Robinson for alleged extortion. Second, the indictment alleged that Cueto conspired to influence and hinder the function of the grand jury by filing false motions, which attacked

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[8] For purposes of this opinion, we only discuss the counts for which Cueto was convicted: Counts 1, 2, 6, and 7. Cueto was acquitted of the charges in Counts 3, 4, and 8. Romanik pleaded guilty to Count 5 of the instant indictment for lying to the grand jury. Pursuant to a deal made with the government, Venezia pleaded guilty to the crimes charged in the indictment and testified at Cueto's trial in exchange for the government's recommendation that his 15 year sentence in the illegal gambling and racketeering case be reduced to the lower end of the Sentencing Guidelines, which would result in a reduction from 15 years to 10 years.

the operations of the FBI and the Office of the United States Attorney, in an attempt to delay and disrupt the investigation and to discharge the grand jury. Finally, the third aspect of the conspiracy focused on Cueto's attempts to obstruct the proceedings in federal district court by persuading Venezia's (and his co-defendants') defense counsel to file various motions, including a motion to disqualify the district court judge assigned to hear the racketeering case.

Counts 2, 6, and 7 of the indictment charged obstruction of justice in violation of the omnibus clause of 18 U.S.C. § 1503,[9] alleging that Cueto corruptly endeavored to use his office as an attorney to influence, obstruct, and impair the due administration of justice in various court proceedings in connection with the prosecution of Venezia, his illegal gambling operation, and the racketeering enterprise in *United States v. B&H Vending/Ace Music Corp. & Thomas Venezia, et al.* Specifically, Count 2 of the indictment charged that Cueto corruptly endeavored to influence the due administration of justice in *Venezia v. Robinson* by filing or causing to be filed pleadings in connection with the proceedings in federal district court, an appellate brief in this court, and a petition for certiorari to the United States Supreme Court. Count 6 involved Cueto's actions in regard to ILCC Agent Bonds Robinson, and the indictment charged that Cueto corruptly endeavored to obstruct the lawful function of the federal grand jury in his attempts to encourage and to persuade State's Attorney Haida to indict Robinson. Count 7 also focused on the filing of various court papers, and the indictment alleged that Cueto corruptly endeavored to influence, obstruct, and impede the proceedings in federal district court by preparing and filing and urging defense counsel to prepare and file false pleadings and court papers in connection with the racketeering case.

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[9] Hereinafter, all statutory references are to Title 18 of the United States Code unless otherwise indicated.

After a jury trial, Cueto was convicted of the charges in Counts 1, 2, 6, and 7 and the district court ordered him to serve a prison term of 87 months, to be followed by two years of supervised release, and imposed monetary penalties. Cueto filed a timely notice of appeal. He asserts several arguments on appeal, challenging his convictions and sentence. First, Cueto contends that the conviction for conspiracy to defraud the government is invalid, arguing that: (1) the meaning of "conspiracy to defraud" in § 371 is unconstitutionally vague as applied to the conduct charged in the indictment; and (2) his conviction may rest on a constitutionally or legally invalid theory because the conduct charged in the indictment includes lawful conduct that was undertaken openly and in public view. Next, Cueto challenges each conviction for obstruction of justice in violation of the omnibus clause of § 1503 as invalid, arguing that: (1) the omnibus clause of § 1503 is unconstitutionally vague as applied to the conduct charged in the indictment; (2) the omnibus clause of § 1503 does not cover either the filing of court papers or attempts to encourage a state prosecutor to investigate another state official for misconduct; (3) the conduct charged fails to satisfy the nexus requirement as articulated by the Supreme Court in *United States v. Aguilar*, 515 U.S. 593 (1995); and (4) an attempt to persuade a prosecutor to take action against a state officer for misconduct is speech protected by the First Amendment.

Cueto also asserts that he is entitled to a new trial because the district court erred when it excluded certain defense evidence: (1) the transcript of the state injunction hearing in *Venezia v. Robinson*; (2) Robinson's testimony at a hearing in one of the state's gambling prosecutions, *People v. Vogt*, arising from Venezia's illegal gambling operation; and (3) Venezia's grand jury testimony, which Cueto wanted to use for impeachment purposes. He also claims that the district court erred by redacting portions of certain documents and newspaper articles. Finally, Cueto ar-

gues that his sentence should be vacated and remanded because the district court judge erroneously calculated his sentence by not grouping the obstruction of justice convictions. With these facts as background, we now consider the issues presented for review and examine each argument in turn.

ANALYSIS

Before we begin our analysis, we discuss the appropriate standard of review, our particular role in this review, and the limited scope of this decision. Our ruling today does not interfere with legitimate avenues of advocacy of even the most zealous of attorneys; we do nothing more than consider the constitutionality of certain criminal statutes aimed at protecting the sanctity and integrity of our justice system from corrupt influences and apply them in a sober and impartial fashion. Ultimately, we consider the sufficiency of evidence presented by the prosecution in our review of the jury's guilty verdict. Appellate review of a jury's verdict is limited; if any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, we are bound to affirm the verdict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We have repeatedly recognized that defendants challenging the sufficiency of the evidence at trial face a "nearly insurmountable hurdle." *See, e.g., United States v. Moore*, 115 F.3d 1348, 1363 (7th Cir. 1997) (citing other cases).

In reviewing the sufficiency of the evidence in a criminal case, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original); *see also United States v. Jackson*, 103 F.3d 561, 567 (7th Cir. 1996). We defer to the jury's credibility determinations, its weighing of the evidence, and its drawing of reasonable inferences and overturn a verdict only when the record contains no

evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt. *Moore*, 115 F.3d at 1363. With that said, we recognize that the defendant asserts various other arguments challenging his convictions and sentence, and we discuss those standards of review at the point in our analysis when we consider those alternative arguments.

I. Obstruction of Justice

Cueto asserts several arguments with respect to his convictions on Counts 2, 6, and 7 for obstruction of justice, contending that the omnibus clause of § 1503 is unconstitutionally vague as applied to the conduct charged in the indictment and, alternatively, that the evidence established at trial on these counts is insufficient to support his convictions. We address each argument in turn and begin with the constitutional challenges. Cueto argues that "much of what lawyers *do*—are attempts to influence the justice system," and that the omnibus clause of § 1503 was not intended to apply to the type of conduct charged in the indictment. Appellant's Brief at 17 (emphasis in original). Questions regarding the constitutionality or scope of a statute are reviewed *de novo*. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-98 (1982).

"[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.'" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983) (internal citations omitted) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The omnibus clause of § 1503 is a catch-all provision that states:

> Whoever . . . *corruptly* or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or *endeavors* to influence, obstruct

> or impede, the due administration of law, shall be imprisoned . . . .

18 U.S.C. § 1503 (emphasis added). This clause was intended to ensure that criminals could not circumvent the statute's purpose "by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of § 1503's specific prohibitions." *United States v. Tackett*, 113 F.3d 603, 607 (6th Cir. 1997). "The obstruction of justice statute was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.'" *United States v. Griffin*, 589 F.2d 200, 206 (5th Cir. 1979) (citation omitted).

Cueto also contends that the vagueness problems are exacerbated by this court's broad construction of the term "corruptly," arguing that it fails to provide meaningful and adequate notice as to what conduct is proscribed by the statute. The Seventh Circuit has approved a jury instruction which articulates a definition for the term "corruptly," and the district court judge included this definition in its instructions to the jury:

> Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.

See Transcript, 32:68-69. The mere fact that a term "covers a broad spectrum of conduct" does not render it vague, and the requirement that a statute must give fair notice as to what conduct is proscribed "cannot be used as a shield by

one who is already bent on serious wrongdoing." *Griffin*, 589 F.2d at 206-207.

There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation-related conduct that results in an obstruction of justice. "Correct application of Section 1503 thus requires, in a very real sense, that the factfinder discern—by direct evidence or from inference—the motive which led an individual to perform particular actions. . . . 'Intent may make any otherwise innocent act criminal, if it is a step in a plot.'" *United States v. Cintolo*, 818 F.2d 980, 991 (1st Cir. 1987) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Therefore, it is not the means employed by the defendant that are specifically prohibited by the statute; instead, it is the defendant's corrupt endeavor which motivated the action. Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids. *See Cintolo*, 818 F.2d at 992 ("means, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive, (ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct").

We are not persuaded by Cueto's constitutional challenges, and his focus is misplaced. The government's theory of prosecution is predicated on the fact that Cueto held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute.[10] Cueto

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[10] This theory of prosecution brings us some pause. With the government's emphasis on Cueto's involvement in Venezia's illegal gambling operation and the racketeering enterprise, we are puzzled why the government did not indict and prosecute Cueto in the underlying racketeering case for his participation in the

(continued...)

focuses entirely on the legality of his conduct, and not the requisite criminal intent proscribed by § 1503. It is undisputed that an attorney may use any *lawful* means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of lawful conduct. However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto's otherwise legal conduct, that separates his conduct from that which is legal.

Even though courts may be hesitant, with good reason and caution, to include traditional litigation-related conduct within the scope of § 1503, the omnibus clause has been interpreted broadly in accordance with congressional intent to promote the due administration of justice and to prevent the miscarriage of justice, and an individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct. *Aguilar*, 515 U.S. at 599; *see also United States v. Goulding*, 26 F.3d 656, 665 (7th Cir. 1994); *Cintolo*, 818 F.2d at 990 ("a criminal lawyer has no license to act as a lawyer-criminal"). Cueto's arguments have no merit. As a lawyer, he possessed a heightened awareness of the law and its scope, and he cannot claim lack of fair notice as to what conduct is proscribed by § 1503 to shield himself from criminal liability, particularly when he was already "bent on serious wrongdoing." *Griffin*, 589 F.2d at 206-207. More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal

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[10] (...continued)
illegal gambling operation. Although the government's decision not to prosecute Cueto in the previous case is fundamentally inconsequential to the instant appeal, we are concerned about the relationship between the instant appeal and the underlying prosecution of the gambling operation and the racketeering enterprise.

violations of the law. There is a discernable difference between an honest lawyer who unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial proceedings. It is true that, to a certain extent, a lawyer's conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer's attempt to advocate his client's interests *within the scope of the law*. It is the "corrupt endeavor" to influence the due administration of justice that is the heart of the offense, and Cueto's personal financial interest is the heart of his corrupt motive.

An amicus brief submitted by the National Association of Criminal Defense Lawyers ("Association") also questions the proper scope of the omnibus clause of § 1503, and the Association articulates its fears that if we affirm Cueto's convictions, criminal defense attorneys will be subject to future prosecutions not only for actual misconduct, but also for apparent and inadvertent wrongdoing, notwithstanding a lawyer's good faith advocacy. The Association believes that this type of sweeping prosecution will sufficiently chill vigorous advocacy and eventually destroy the delicate balance between prosecution and defense which is necessary to maintain the effective operation of the criminal justice system. Although the Association discusses valid policy concerns and asserts legitimate arguments, some of which we generally agree with, we are also concerned with the flipside of its argument. If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law. We have the responsibility to ensure that the integrity of the criminal justice system is maintained and that protection includes granting to both the prosecution and the defense flexibility and "discretion in the conduct of the trial and

the presentation of evidence," *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976), in addition to enforcing mechanisms of punishment, which necessarily include criminal prosecution, to prevent abuses of the system.

We have carefully examined the fears articulated by the National Association of Criminal Defense Lawyers, in addition to the arguments put forth by the defendant, that a decision upholding the application of the omnibus clause of § 1503 to litigation-related conduct may deter or somehow chill the criminal defense lawyers in zealous advocacy, and we find those concerns to be exaggerated, at least as considered in light of the facts in the present case. Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer's misconduct and criminal acts are not absolutely immune from prosecution. We cannot ignore Cueto's corrupt endeavors to manipulate the administration of justice and his clear criminal violations of the law. As the First Circuit recognized in *Cintolo*:

> Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the maddening crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici. Nor is there sufficient public policy justification favoring such a result. To the contrary, the overriding public policy interest is that "[t]he attorney-client relationship cannot . . . be used to shield or promote illegitimate acts. . . ." "[A]ttorneys, just like all other persons, . . . are not above the law and are subject to its full application under appropriate circumstances."

818 F.2d at 993-94 (internal citations omitted). Accordingly, we conclude that the omnibus clause of § 1503 may be used to prosecute a lawyer's litigation-related criminality and that neither the omnibus clause of § 1503 nor this court's construction of the term "corruptly" is unconstitutionally vague as applied to the conduct charged in the indictment for which Cueto was convicted.

We now turn to Cueto's argument that his convictions on the obstruction of justice counts were not supported by sufficient evidence. Cueto's task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelmingly supports the jury's verdict. In order to establish a violation of § 1503, the government must demonstrate that: (1) there was a pending judicial proceeding; (2) the defendant knew of the proceeding; (3) he influenced, obstructed, or impeded, or endeavored to influence, obstruct or impede the due administration of justice; and (4) he did so corruptly. *United States v. Maloney*, 71 F.3d 645, 656 (7th Cir. 1995). There must be a nexus between the defendant's efforts and the judicial proceeding sought to be corruptly influenced. *Aguilar*, 515 U.S. at 598-599. However, a defendant's actions need not be successful in order to be prosecuted under the statute. All that is required is that the defendant has knowledge or notice that his actions are likely to affect the just administration of the subject proceedings. *Id.*

Again the focus of Cueto's argument is misplaced; he argues that his conduct does not fall within the scope of the omnibus clause of § 1503 and that the government presented insufficient evidence to demonstrate his guilt. Cueto, however, fails to address the essence of the government's allegations and, ultimately, the basis for his convictions; it is his corrupt endeavor to obstruct the administration of justice that transforms his traditional litigation-related conduct into criminal violations of the law. The gloss which Cueto places on the evidence manifestly misapprehends both the jury's fact finding function and our role in the review of the verdict. In light of the considerable circumstantial evidence in support of its assessment of the situation, the jury was reasonably entitled to disbelieve Cueto's characterization of his conduct and to accept the contrary interpretation urged by the government that Cueto, with a corrupt purpose, endeavored to obstruct the due administration of justice. That finding cannot be lightly overturned. Indeed, the record adequately

supports the conclusion that Cueto's conduct, though nominally litigation-related conduct on behalf of his client, was undertaken with the corrupt intent to protect Venezia, Venezia's associates, and his business from criminal prosecution and to safeguard his personal financial interest in the illegal gambling operation, whatever the costs and consequences to the due administration of justice.

The charges in Count 2 of the indictment included allegations of a corrupt endeavor to obstruct the due administration of justice in *Venezia v. Robinson* by filing pleadings in federal district court and a continued attempt to hinder the proceedings by filing an appeal in this court and a petition for certiorari in the United States Supreme Court. The evidence demonstrates that Cueto successfully exposed the FBI's investigation, uncovered the evidence it had gathered, obtained the injunction against Robinson, and continued to file frivolous appeals after the district court dismissed the injunction and the complaint. *See* Transcript, 15:62-63; 16:71-72. Government agents, in fact, testified that the investigation was disrupted and that Cueto "blew the lid off the ongoing investigation." *See* Transcript, 3:44; 16:55-59. The jury was amply justified in concluding that Cueto's repeated filings were motivated by his attempt to protect his client from prosecution and to safeguard his financial interest. Cueto's actions may qualify as traditional litigation-related conduct in form, but not in substance, and the evidence presented at trial demonstrates that Cueto clearly intended and corruptly endeavored to obstruct the due administration of justice in *Venezia v. Robinson*.

Similar to Count 2, Count 7 includes allegations of preparing and filing and causing defense counsel to prepare and file false pleadings and other court papers; the indictment specifically charged Cueto with encouraging defense counsel in the racketeering case to file false motions and pleadings for the purpose of impeding and obstructing the administration of justice in that case. We have no doubt that Cueto in fact intended to interfere with the investiga-

tion, attempted to delay the indictment, and endeavored to obstruct the proceedings in federal district court in connection with the prosecution of Venezia. *See* Transcript, 23:74; 25:17. We simply are not dealing with non-corrupt, legitimate involvement in the preparation of Venezia's (and his co-defendants') defense. Nor are we dealing with inadvertent interference. From the evidence presented at trial, the jury was amply justified in concluding without a doubt that Cueto corruptly endeavored to obstruct the district court's proceedings in the gambling and racketeering prosecution.

In response to his conviction on Count 6, Cueto argues that his conviction should be reversed because the *Aguilar* nexus is absent; he contends that the government presented insufficient evidence to establish the relationship between his attempts to persuade State's Attorney Haida to investigate and indict Robinson and a pending judicial proceeding.[11] Cueto contends that at the time the conduct charged in the indictment occurred, the grand jury had not yet been empaneled and that Venezia had not been indicted in the racketeering case, and therefore the nexus is lacking. His argument, however, mischaracterizes the frame of time at issue in addition to the indictment and the charges therein. "It is well established that investiga-

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[11] Cueto also asserts an alternative argument that his attempts to persuade the local prosecutor to indict a state official for misconduct are protected by the First Amendment. Speech which is false and misleading is not protected by the First Amendment's right to freedom of speech. *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *United States v. Walton*, 36 F.3d 32, 35 (7th Cir. 1994). Just as false statements are not immunized by the First Amendment, meritless litigation based on false accusations and criminal intentions does not fall within the scope of protected speech and "is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983). Cueto fails to show that his conduct is entitled to First Amendment protection; Cueto's conduct is not the kind of conduct with even a colorable claim to First Amendment protection and his argument must fail.

tions undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute 'the due administration of justice' under § 1503." *Maloney*, 71 F.3d at 657.

Though Cueto's initial calls and letters to State's Attorney Haida may pre-date the empaneling of the grand jury, the phone call to Congressman Costello occurred after the indictment was unsealed. In addition, his letters to the State's Attorney occurred throughout the investigation, and the evidence indicates that Cueto knew of the investigation. Accordingly, Cueto's conduct prior to the empaneling of the grand jury as well as his subsequent acts to encourage State's Attorney Haida to investigate and prosecute Agent Robinson have the requisite nexus to the judicial proceedings; there was sufficient evidence presented at trial for a rational trier of fact to conclude beyond doubt that Cueto repeatedly attempted to urge Haida to prosecute Robinson knowing that an investigation into Robinson's conduct would hinder the government's ability to continue to investigate Venezia and the gambling operation.

Whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case. We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests and then avoid criminal prosecution by claiming that they were "just doing their job." As the First Circuit stated in *Cintolo*, "[w]e refuse to chip some sort of special exception for lawyers into the brickwork of § 1503." 818 F.2d at 996. We respect the importance of allowing defense counsel to perform legitimate activities without hindrance and recognize the potential dangers that could arise if prosecutors were permitted to inquire into the motives of criminal defense attorneys ad hoc. This case, however, does not create that avenue of inquiry; our conclusion is limited to the specific facts of this case. Viewing the facts and inferences most favorably to the government, as we are required to do, there was ample basis for the jury to find that Cueto

corruptly endeavored to obstruct the due administration of justice. The jury was justified in concluding that Cueto had the requisite knowledge of the FBI's investigation of Venezia, the grand jury's inquiry, and the district court's proceedings and then acted in a manner that had the natural and probable effect of interfering with the lawful function of those governmental entities and the due administration of justice. His role as a defense attorney did not insulate him from the criminal consequences of his corruptly-motivated actions. Accordingly, we affirm Cueto's convictions on Counts 2, 6, and 7.

II. CONSPIRACY TO DEFRAUD THE UNITED STATES

Cueto next challenges his conviction on Count 1 for conspiring to defraud the United States in violation of 18 U.S.C. § 371, arguing that the statute is unconstitutionally vague as applied to the conduct charged in the indictment. He claims that the "conspiracy to defraud" clause is void for vagueness in the instant case because neither the statutory language, the legislative history, nor the case law interpreting § 371 provides adequate notice to a person of ordinary intelligence that conduct such as that charged in the instant indictment would violate the statute. Cueto also argues that his conviction should be reversed because it may rest on a legally or constitutionally invalid theory.

Count 1 of the indictment charged Cueto with conspiracy to defraud the United States, in violation of § 371, which states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. § 371. We have recognized that the statute is broad enough in its terms to include any conspiracy for the

purpose of impairing, obstructing or defeating the lawful function of any department of the government; neither the conspiracy's goal nor the means used to achieve it need to be independently illegal. *United States v. Jackson*, 33 F.3d 866, 870 (7th Cir. 1994). To sustain a conviction for conspiracy to defraud, the record must demonstrate: (1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) an intent to commit the substantive offense—in this case, the intent to obstruct justice. *United States v. Cyprian*, 23 F.3d 1189, 1202 (7th Cir. 1994). Intent, as well as the agreement, may be inferred from circumstantial evidence concerning the relationship of the parties, their overt acts, and the totality of their conduct. *United States v. Marren*, 890 F.2d 924, 933 (7th Cir. 1989).

The meaning of "conspiracy to defraud" is framed in general terms; it is impossible for Congress to anticipate, identify, and define each and every context in which an agreement to act would qualify as a conspiracy to defraud. As the Supreme Court recognized in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997), "general statements of the law are not inherently incapable of giving fair and clear warning, . . . even though 'the very action in question has [not] previously been held unlawful.'" 117 S. Ct. at 1227 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Supreme Court clarified the meaning of conspiracy to defraud:

> To conspire to defraud the United States means . . . to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

265 U.S. at 188. The fact that § 371 has been applied to agreements not expressly anticipated by Congress nor specifically articulated in the statute does not demonstrate ambiguity nor does it create vagueness problems. "A statute can be unambiguous without addressing every interpretative theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas v. United States*, 118 S. Ct. 469, 475 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)). In fact, the Second Circuit has recognized that an indictment charging a conspiracy to defraud need only articulate with particularity "the essential nature of the alleged fraud." *United States v. Helmsley*, 941 F.2d 71, 90-91 (2d Cir. 1992).

Although § 371 does not specifically articulate that Cueto's various acts, which impaired the FBI's investigation, impeded the inquiries of the grand jury, and delayed and obstructed the proceedings in the district court, fall within its scope, the instant indictment alleges with particularity "the essential nature of the alleged fraud" and identifies Cueto's specific conduct which furthered the conspiracy. The allegations in the indictment specifically describe the conduct charged as part of the essential nature of the alleged fraud, which provides the basis of Cueto's conviction for conspiracy to defraud. As applied to the conduct charged in the instant indictment, the conspiracy to defraud clause of § 371 is not unconstitutionally vague, and the plain and ordinary meaning of "conspiracy to defraud" necessarily reaches Cueto's conduct.

Cueto, however, argues that the specificity of the indictment is problematic and far-reaching because it includes non-criminal conduct, which may not properly be a valid basis for the criminal charges and, ultimately, his conviction on Count 1. Cueto contends that his conduct is lawful "lawyering conduct" and that he cannot be guilty of a conspiracy to commit acts which are not criminal. To the contrary, the record clearly demonstrates that his conduct, which necessarily includes his corrupt endeavors, was not typical conduct of a lawyer and that it certainly was not

lawful lawyering conduct. Based on our earlier determinations that there was sufficient evidence at trial to convict Cueto on the obstruction of justice charges for his litigation-related conduct, we can similarly dispose of the present argument. Although his actions initially may have stemmed from routine, even vigorous, advocacy, at some point his conduct exceeded the scope of lawful lawyering conduct. "'[A]cts which are themselves legal lose their legal character when they become constituent elements of an unlawful scheme.'" *United States v. Bucey*, 876 F.2d 1297, 1312 (7th Cir. 1989) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962)). Indeed, it is evident that many of his actions were prohibited by the rules of professional responsibility and the canons of legal ethics. *See* Transcript, 22:1-114. Although those violations do not necessarily constitute criminal violations of the law, they are further evidence of an intent to participate in the conspiracy.

We recognize that Cueto may initially have been hired in his professional capacity to provide legal advice and representation, but it was equally reasonable for the jury to conclude from the evidence presented at trial that his representation also was undertaken for a criminal purpose in an attempt to protect the illegal gambling operation and to prevent government interference and that Cueto's role in the conspiracy was to use the power of his office as an attorney for the corrupt purpose of impairing, impeding, and obstructing the investigation, indictment, and prosecution of the illegal gambling and racketeering enterprise. Similarly, it was reasonable for the jury to conclude that Cueto agreed to participate in this scheme for his personal financial gain; the income generated by Venezia's illegal gambling operation was used to fund additional business ventures pursued in partnership with Cueto. Examining the evidence in the light most favorable to the government, we conclude that a rational jury could have found that the government proved the elements of § 371 beyond a reasonable doubt and that Cueto conspired with others and pur-

posefully and knowingly participated in a corrupt scheme to defraud the United States. Accordingly, we find no error with Cueto's conviction on Count 1.

III. Evidentiary Rulings of the District Court

Cueto also claims that he is entitled to a new trial based on the district court's incorrect evidentiary rulings. He challenges three specific evidentiary rulings, in which the district court excluded the transcript of the state injunction hearing in *Venezia v. Robinson* and Robinson's testimony at the *Vogt* hearing and admitted redacted portions of certain documents. We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Whitaker*, 127 F.3d 595, 601 (7th Cir. 1997). The defendant has "a heavy burden in challenging a trial court's evidentiary rulings on appeal . . . ." *United States v. Briscoe*, 896 F.2d 1476, 1489-90 (7th Cir. 1990). The trial court's rulings are given special deference "because of the trial judge's first-hand exposure to the witnesses and the evidence as a whole, and because of his familiarity with the case and ability to gauge the likely impact of the evidence in the context of the entire proceeding." *United States v. Torres*, 977 F.2d 321, 329 (7th Cir. 1992). Under an abuse of discretion standard, reversal is warranted "only when the trial judge's 'decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision . . . .'" *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir. 1992) (quoting *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563-564 (7th Cir. 1984)).

Cueto first complains that the district court's decision to exclude the transcript of the injunction hearing prevented him from showing that he had a reasonable belief that Robinson was in fact a corrupt agent. The district court refused to admit the transcript of the hearing into evidence because, among other reasons, the hearing was conducted in violation of Robinson's rights as determined by this court in *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994).

Specifically, Robinson received notice of the injunction hearing through fraudulent pretenses created by Cueto, and the state court judge denied Robinson his right to counsel and conducted the hearing in violation of his right to due process of law. The district court recognized that Cueto should not be able to profit from his own wrongdoing and therefore excluded the transcript. We find no error with this determination.

Next, Cueto contends that the court erred by denying him the ability to present testimony to demonstrate his reasonable belief that Robinson perjured himself at the *Vogt* hearing. The record shows that the district court limited Cueto's testimony because he intended to attack Robinson's credibility and to discuss testimony Robinson had given in other court proceedings. The district court ruled that the proposed evidence was hearsay and excluded it. We agree with the district court's ruling that Cueto should not be permitted to discuss on the witness stand testimony Robinson had given in other court proceedings. FED. R. EVID. 801. The court also determined that because Robinson was never called as a witness his credibility could not be attacked. *See* Transcript, 26:120-121. We find no error in the court's decision to exclude this evidence.

Finally, Cueto argues that the redacted documents, admitted by the district court, provided an incomplete and inaccurate description of his purpose for publishing the *East Side Review* articles and his reasons for submitting various filings to the court. However, the record demonstrates that the district court redacted the various documents because in a pre-trial motion, the judge had determined that prosecutorial misconduct was not a viable defense and the documents in question included various allegations of prosecutorial misconduct and attacked the integrity of the prosecutors. The court refused to allow any discussion of or reference to allegations of governmental misconduct to be presented to the jury. Cueto disregards the record and does not address the specific grounds for the trial court's rulings on the exclusion of this evidence. We conclude that the court's decision to redact the documents was proper; ad-

mission of the documents in their entirety would have impermissibly placed allegations of prosecutorial conduct before the jury. *See United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996).

For the sake of argument, even if the district court's rulings were erroneous, reversal is not required so long as the errors were harmless, and "harmful error results only if the error has a substantial and injurious effect or influence on the jury's verdict." *United States v. Schoenborn*, 4 F.3d 1424, 1429 (7th Cir. 1993). A defendant is entitled to a new trial only if there is "a reasonable possibility" that the exclusion of the evidence had "a prejudicial effect upon the jury's verdict." *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996). When viewed in the context of the entire trial and the totality of the evidence, the jury heard substantial evidence to support the government's theory of prosecution. The admission of the excluded evidence would not have produced a different result in this case; the jury possessed more than enough evidence to convict Cueto for conspiring to defraud the government and for obstructing the due administration of justice. Thus, even if the district court's evidentiary rulings were erroneous, the errors were harmless, and Cueto is not entitled to a new trial.

Cueto also argues that he is entitled to a new trial because the district court violated his Sixth Amendment right to confront witnesses by refusing to allow defense counsel to impeach Venezia with his grand jury testimony during cross-examination. Normally, we review a trial court's restriction on or limitation of cross-examination for an abuse of discretion. *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir. 1995). However, where the restriction impacts the defendant's Sixth Amendment right to confrontation, the review is *de novo*. *Id.* "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). So long as cross-examination elicits adequate information to allow a jury to

assess a witness's credibility, motives, or possible bias, the Sixth Amendment is not compromised by a limitation on cross-examination. *Sasson*, 62 F.3d at 883.

On direct examination, Venezia admitted that he had perjured himself in his grand jury testimony to protect Cueto. *See* Transcript, 5:223-229. As such, the value of his grand jury testimony was limited. Nonetheless, Cueto contends that Venezia's grand jury testimony was crucial to impeach other aspects of his testimony at trial. Mere restrictions on the scope of cross-examination do not necessarily constitute a constitutional error in violation of the Confrontation Clause. *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986). So long as defense counsel has sufficient opportunity to cross examine a witness, it is of peripheral concern to the Sixth Amendment how much opportunity counsel gets to "hammer [a] point home to the jury." *Sasson*, 62 F.3d at 882. Even though the district court excluded Venezia's grand jury testimony, Cueto had ample opportunity to demonstrate Venezia's lack of credibility during cross-examination. We therefore conclude that Cueto's Sixth Amendment right was not compromised.

IV. Sentencing Issues

Finally, Cueto contends that the district court erroneously calculated his sentence, arguing that the three counts of obstruction of justice should have been grouped pursuant to United States Sentencing Guideline § 3D1.2. We review the district court's factual determinations underlying the application of the Sentencing Guidelines for clear error. *United States v. Owolabi*, 69 F.3d 156, 162 (7th Cir. 1995). A district court's decision between two permissible choices involves resolution of facts that requires the perspective and special competence of the trial judge, and courts of appeals give due deference to the trial judge's determinations, "for it embodies the traditional exercise of discretion by a sentencing court." *Koon v. United States*, 518 U.S. 81, 98 (1996).

Section 3D1.2 requires that the sentencing judge group any count "involving the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2. This section contemplates a grouping decision based on a "single course of conduct with a single criminal objective" and does not authorize the grouping of offenses that do not represent essentially one composite harm. *Id.* at Application Note 4.[12] A primary consideration in this section is whether the offenses involve different victims, and "victim" is defined as the person "who is directly and most seriously affected by the offense . . . ." *Id.* at Application Note 2. For offenses in which there are no identifiable victims, the victim for purposes of this section is the societal interest that is harmed, and the grouping decision is based on "the nature of the interest invaded by each offense." *United States v. Bruder*, 945 F.2d 167, 170 (7th Cir. 1991).

This case is a "victimless" crime, so the harm to societal interests must be considered. Cueto argues that his crimes harmed the same societal interests and fall within the scope of Sentencing Guideline § 3D1.2. Instead, the district court accepted the government's argument that different societal interests were harmed in each offense of conviction and consequently the judge considered each count separately for purposes of calculating of Cueto's sentence.[13]

The district court relied primarily on this court's decision in *United States v. Owolabi*, in which we affirmed a judge's decision not to group an immigration offense and a coun-

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[12] For example, the same crime against the same victim on separate occasions would not be grouped because each separate crime, even though they may be identical, involves separate instances of risk of harm.

[13] By not grouping the offenses of conviction together when calculating his sentence, the district court effectively increased Cueto's sentence.

terfeit securities offense. 69 F.3d at 167. Cueto attempts to distinguish *Owolabi* from the present case, arguing that his offenses involved convictions under the same statute, unlike the conduct charged in *Owolabi* which involved separate offenses of conviction. He argues that the conduct for which he was convicted ultimately shared a common goal with a singular purpose: to obstruct the investigation, indictment, and prosecution of the illegal gambling and racketeering case. In his reply brief, Cueto emphasizes that the government characterized his actions as "a unitary effort" to prevent the government from shutting down the gambling operation, and he contends that the government cannot abandon that theory of a unitary purpose to justify the imposition of a longer sentence based upon its argument that multiple societal interests were harmed. Appellant's Reply Brief at 30.

We do not dispute Cueto's argument that the government characterized Cueto's actions as a unitary effort with a common goal, and we certainly recognize that the instant case is distinguishable from *Owolabi* because Cueto's offenses of conviction involve violations of the same statute. Notwithstanding these arguments, Cueto's conduct invaded three distinct societal interests—the proper functioning of the FBI, the grand jury, and the district court—and each entity has a fundamentally separate and unique governmental function. Cueto's conduct disrupted and interfered with the lawful function of various governmental entities at different times throughout a period of approximately two or three years. His purpose may have involved only one criminal objective, but it certainly did not involve a single course of action. The district court's determination that the societal interests harmed were sufficiently distinct to preclude grouping was not clearly erroneous. Therefore, we conclude that district court judge properly applied Sentencing Guideline § 3D1.2 when he calculated Cueto's sentence.

CONCLUSION

For the reasons discussed above, keeping in mind the limited scope of our holding, we AFFIRM the defendant's convictions and the sentence imposed by the district court.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—7-31-98

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1998.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

UNITED STATES OF AMERICA,	) Appeal from the
	) United States District
Plaintiff-Appellee,	) Court for the Southern
	) District of Illinois.
No. 97-3439 v.	)
	) No. 96 CR 30070
AMIEL CUETO,	)
	) **Stephen N.**
Defendant-Appellant.	) **Limbaugh,** Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the defendant-appellant, all of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc in DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	) Criminal No.
vs.	) 96-30070-SNL
	)
AMIEL CUETO, ET. AL.,	)
	)
Defendant.	)

MEMORANDUM AND ORDER

This matter is before the Court on defendant Cueto's motion to dismiss Counts 2 and 7, Count 3, and Counts 4 and 6 of the Indictment (#39), filed September 10, 1996. Extensive responsive pleadings have been filed by the Government and defendant Cueto.

Essentially, defendant Cueto seeks dismissal of the counts which charge him with obstruction of justice in violation of 18 U.S.C. §1503. For the most part, he argues that the indictment fails to charge him with any act that could be considered criminal under §1503. He contends that none of the acts alleged are criminal in themselves, and that there is simply no connection between the commission of these acts and any endeavor to impede or influence the 1994 and/or 1995 grand juries. The Government counters that defendant's motion is an improper attempt to prematurely assert his trial defenses; and that the Court should not address "sufficiency of evidence" issues at this time. It further contends that each of the subject counts properly avers a violation of §1503 in that every act alleged (in the subject counts) was part of a course and pattern by defendant in his "corrupt endeavor" to influence, obstruct and

impede the due administration of justice in the grand juries and judicial proceedings. The Government contends that defendant is incorrectly focusing on the "means" by which he attempted to carry out his violations of §1503, as opposed to focusing on whether the defendant had the requisite criminal "intent" to commit the §1503 violations.

Section 1503 provides:

> "Whoever corruptly, or by threats or force, or by an threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice shall be punished as provided . . ."

In the present indictment, defendant Cueto is charged with violations of the "Omnibus Clause", to wit: with "corruptly endeavor[ing] to influence, obstruct, and impede the due administration of justice of two grand juries' proceedings and certain court proceedings. In Counts 2 and 7, defendant Cueto

is charged with violating §1503 with regard to the court proceedings in Venezia v. Robinson and U.S. v. B & H Vending/Ace Music by preparing and filing and causing to be prepared and filed false pleadings and court papers in the federal district and appellate courts. In Count 3, defendant Cueto is charged with violating §1503 with regard to the 1994 Grand Jury investigation in the Venezia - B & H Vending racketeering case by advising a grand jury witness that it was unnecessary to appear in response to a grand jury subpoena, and that if the witness did appear to testify, that such witness should assert his Fifth Amendment privilege against self-incrimination. Finally, Counts 4 and 6 charge defendant Cueto with violating §1503 with regard to the 1994 Grand Jury investigation in the Venezia - B & H Vending racketeering case and the subsequent trial of the Venezia - B & H Vending racketeering case by instructing Venezia to replace gambling machines after the federal authorities gambling raid, by instructing Venezia's counsel to remove statements from court pleadings referencing Cueto's instructions to Venezia to replace the seized gambling machines, and by engaging in acts designed to facilitate the indictment of Agent Bonds Robinson, including the offering of a judicial position to the St. Clair County State's Attorney so that Cueto could fill the vacancy of the State's Attorney position (presumably in order to indict Robinson).

The Court has carefully reviewed the parties' pleadings and the relevant caselaw. It is this Court's considered opinion that the indictment properly alleges violations of §1503 and should not be dismissed.

The court agrees that after thoroughly reviewing Cueto's pleadings, it appears that the entire substance of his arguments is the (in)sufficiency of the evidence to prove the allegations contained in the indictment. This is not a proper basis for a motion to dismiss the indictment. However, upon further reflection, and broad interpretation of defendant's motion and

responsive pleadings, the Court is willing to consider defendant's argument as one being that the indictment is invalid (as it pertains to Counts 2, 3, 4, 6 and 7) because the allegations, even if true and accurate, fail to constitute criminal offenses under §1503. To be valid, an indictment must allege acts, which if proven, would constitute an offense under the law that the defendant is charged with violating. U.S. v. Bucey, 876 F.2d 1297, 1302 (7th Cir. 1989).

Section 1503 prohibits a person from endeavoring to obstruct or impede the "due administration of justice". In order to establish a violation of §1503, the Government must demonstrate that the defendant knew of a pending judicial or grand jury proceeding and intended to impede its administration. U.S. v. Aguilar, ___ U.S. ___, 115 S.Ct. 2357, 2362 (1995); U.S. v. Maloney, 71 F.3d. 645, 656 (7th Cir. 1995); U.S. v. Bucey, at 1314. It is not sufficient that there be an intent to influence an ancillary proceeding, such as an investigation independent of a court's or grand jury's authority. Aguilar, 115 S.Ct. At 2362. However, investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute "the due administration of justice" under §1503. Maloney, at 657. A "nexus relationship" must be shown; i.e. the acts alleged must have a relationship in time, causation, or logic with the judicial or grand jury proceedings. Aguilar, 115 S.Ct. at 2362. "In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." Aguilar, 115 S.Ct. at 2362. A defendant's actions need not be successful in order to be prosecuted under §1503. All that is required is that the defendant has knowledge or notice that his or her actions are likely to affect the just administration of the subject proceedings. Aguilar, 115 S.Ct. at 2362; Bucey, at 1314; U.S. v. Machi, 811 F.2d. 991, 997-98. Section 1503 has both and "intent" element and a "means" element; "[i]t makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is

foiled in some way." Aguilar, 115 S.Ct. at 2563.

Cueto's argument for dismissing the subject counts is grounded in two basic contentions: 1) the acts alleged are not illegal in themselves; and 2) there is no "nexus relationship" between any of the alleged acts and an "endeavor" to obstruct the due administration of any pending judicial or grand jury proceeding. Consequently, Cueto avers, that the indictment fails to proscribe any criminal act upon which he can be convicted. Defendant's argument is meritless.

Firstly, Cueto's argument is misplaced in that he focuses entirely upon the legality of the acts alleged in these counts, and not on the requisite criminal intent proscribed by §1503. He contends that he cannot be held criminally liable for filing false legal papers or for advising someone to assert their constitutional rights. Normally, this might be true; however, "[i]t is equally clear, from both the plain meaning of the statutory language and the caselaw interpreting it, that §1503 criminalizes conduct which obstructs or impedes the due administration of justice, provided such conduct is undertaken with a corrupt or improper purpose." U.S. v. Cintolo, 818 F.2d. 980, 990-91 (1st Cir. 1987). Courts have routinely interpreted federal obstruction statutes, including §1503, as encompassing means, that are not illegal in themselves, when employed to obstruct justice as falling within the purview of the "corrupt endeavor" language of the statutes. U.S. v. Mitchell, 877 F.2d. 294, 299 (4th Cir. 1989) (citations omitted); *see also*, U.S. v. Mitchell, 985 F.2d. 1275, 1278 (4th Cir. 1993). "The proper inquiry is whether a defendant had the requisite corrupt intent to improperly influence the investigation, not on the means the defendant employed in bringing to bear this influence." Mitchell, 877 F.2d. at 299 *citing* Cintolo, at 991-93.

Defendant Cueto's status as an attorney provides him with no protection from prosecution under §1503. The argument that acts clothed, in part, in the "mantle of superficially

'professional'" conduct exonerate the lawyer from culpability has been rejected by the courts. Cintolo, at 990. "As important a role as defense counsel serve - and we do not minimize its importance one whit - the acceptance of a retainer by a lawyer in a criminal case cannot become functionally equivalent to the lawyer's acceptance of a roving commission to flout the criminal law with impunity. A criminal lawyer has no license to act as a lawyer-criminal." Cintolo, at 990.

Even advising a client to assert the Fifth Amendment privilege against self-incrimination can become a criminal act under §1503 if done with the requisite "corrupt endeavor" to impede or influence the due administration of justice in a grand jury or court proceeding. Courts have held that it is a violation of §1503 to influence a witness not to recall something or even to invoke the Fifth Amendment, if such advice is given with the requisite corrupt intent. Mitchell, 877 F.2d. at 299; Cintolo, at 992-93; U.S. v. McComb, 744 F.2d. 555, 563 (7th Cir. 1984); see, U.S. v. Cioffi, 493 F.2d. 1111, 1119 (2nd Cir. 1974); U.S. v. Cole, 329 F.2d. 437, 440-43 (9th Cir. 1964); *see also*, Maness v. Meyers, 419 U.S. 449, 470 n.19 (1975).

It is clear that otherwise lawful means, even those undertaken by an attorney in the course of representing a client, "can transgress §1503 if employed with the corrupt intent to accomplish that which the statute forbids." Cintolo, at 993.

As to the lack of a "nexus relationship" between the acts alleged and the grand juries' investigations, this argument too fails. The indictment, taken as a whole, vividly describes and alleges a continuing scheme by defendant Cueto involving many activities, including the ones highlighted in the subject counts, undertaken with the "corrupt endeavor" to impede, obstruct, or influence the investigation of the grand juries involved in the Venezia - B & H Vending racketeering case, as well as this case. The acts highlighted in the subject counts cannot be taken out of

context of the scheme or viewed in isolation. The indictment clearly alleges that due to defendant Cueto's law firm's representation of certain individuals and by virtue of defendant Cueto's own activities, Cueto was aware of the 1994 grand jury's investigation and that the investigation was a continuation of its predecessor grand jury's work. The indictment details defendant Cueto's intimate association with Venezia and several persons who ultimately became grand jury witnesses during the investigation by the grand jury and the prosecution of the racketeering case. The indictment specifically outlines the federal law enforcement investigation tie-in to the grand jury's investigation. The indictment sufficiently alleges enough facts from which a jury could readily find that defendant Cueto acted with the knowledge and corrupt intent to believe that the success of his corrupt endeavor would likely influence, impede, or obstruct the due administration of the pending grand jury or court proceedings. To summarize, the Court finds that the indictment sufficiently alleges a "nexus relationship" in time, causation, or logic between the acts alleged and pending grand jury or judicial proceedings.

Accordingly,

IT IS HEREBY ORDERED that defendant Cueto's motion to dismiss Counts 2 and 7, 3, and 4 and 6 of the Indictment (#39) be and is DENIED.

Dated is 25th day of March, 1997.

Stephen N. Limbaugh
United States District Judge

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-825

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence that petitioner, an attorney, engaged in litigation-related activities with the purpose of obstructing justice and protecting his personal financial interests supported his convictions under the omnibus clause of 18 U.S.C. 1503.

2. Whether the First Amendment precluded petitioner's prosecution for endeavoring to obstruct justice by making false and criminally motivated allegations of misconduct against a government investigator.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 151 F.3d 620.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1998. The petition for rehearing was denied on August 24, 1998. The petition for a writ of certiorari was filed on November 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on one count of conspiring to defraud the

United States, in violation of 18 U.S.C. 371, and on three counts of obstructing justice, in violation of 18 U.S.C. 1503. He was sentenced to 87 months' imprisonment and fined $80,000. The court of appeals affirmed. Pet. App. 1-34.

1. a. Thomas Venezia operated an illegal video gambling business, known as B&H Vending/Ace Music corporation, which supplied video poker games to local bars in East St. Louis, Illinois, including a Veterans of Foreign Wars (VFW) post. The bars agreed with B&H to make illegal gambling payouts to their customers. In the early 1990s, the Illinois Liquor Control Commission (ILCC) and the State Police initiated a joint investigation of illegal gambling operations in southern Illinois. Eventually, the Federal Bureau of Investigation (FBI) became interested in the investigation, and it used ILCC Agent Bonds Robinson in an undercover role to gather evidence about Venezia and B&H. Pet. App. 3-4.

Petitioner, a prominent and politically influential local businessman and attorney, was Venezia's business partner in various enterprises, including illegal gambling operations. Pet. App. 8-9, 16-17, 21, 27. Several of those joint enterprises depended on the continued operation of B&H and the illegal gambling business to secure loans and cover the debts that petitioner and Venezia had incurred. *Id.* at 8-9. During the period that Venezia and B&H were under investigation, petitioner also served as Venezia's lawyer and advisor. *Id.* at 2. To protect his own business and financial interests, petitioner made a variety of false legal filings and took other fraudulent court actions motivated by the purpose of forestalling the federal investigation of Venezia and the illegal enterprises. *Id.* at 17- 18, 21-22.

b. Count 1 of the indictment in this case charged that petitioner conspired with Venezia and others to defraud the United States, in violation of 18 U.S.C. 371, by "interfer[ing] with the investigation and criminal prosecution of the B&H racketeering organization and its members and thereby prevent the dismantling by federal authorities of the multi-million dollar illegal gambling operation in an effort to safeguard the [conspirators'] valuable joint business and financial interests[.]" Indictment 8-9. Petitioner was convicted on that conspiracy count, and he does not seek review of that conviction in this Court.

Count 2, the first of several counts alleging violations of 18 U.S.C. 1503, charged petitioner with seeking to impede the investigation by filings in an action commenced in state court (and later removed to federal court) seeking to enjoin Robinson from investigating Venezia's business. Pet. App. 5. In that proceeding, which one court subsequently described as a "parody of legal procedure" (*Venezia* v. *Robinson*, 16 F.3d 209, 210 (7th Cir.), cert. denied, 513 U.S. 815 (1994)), petitioner used a fraudulent pretext to lure Robinson into a state courthouse, served him with a subpoena, and then had a judge compel him to reveal the confidential details of the FBI investigation. Pet. App. 5. As government agents testified at petitioner's trial, his plan "blew the lid off the ongoing investigation." *Id.* at 21. The goal of the proceeding was, in petitioner's words, to "get this guy [Robinson] before this guy get[s] us." 11 Tr. 22; see also Gov't C.A. Br. 7; 4 Tr. 147.

Count 6 charged petitioner with violating Section 1503 by seeking Robinson's indictment in state court as another means of trying to neutralize his investigatory efforts. Pet. App. 11; see Indictment 28 (petitioner "engag[ed] in acts to persuade [a state prosecutor] to

indict Agent Robinson, including by offering and causing to be offered a judicial position as a political favor to [the prosecutor] to permit [petitioner] to fill the vacancy and indict Robinson"). In pursuing that indictment, petitioner falsely told a state prosecutor that Robinson had committed perjury by denying (at a hearing involving one of Venezia's customers) petitioner's allegation that Robinson had accepted a bribe from beer distributor Tony Joynt. Petitioner made that accusation after he had forced Robinson to disclose in court that he was not in fact a corrupt state liquor agent but was working undercover for the FBI, and petitioner knew that the accusation was false. See note 7, *infra*; Pet. App. 22 n.11.

Finally, Count 7 charged that petitioner obstructed justice by preparing, or assisting in the preparation of, false pleadings and court papers in the underlying racketeering proceeding against Venezia and B&H, for the purpose of impeding and obstructing the administration of justice in that case. See Pet. App. 11, 21.

2. On appeal, petitioner contended that his convictions for obstruction of justice should be reversed on the grounds that Section 1503 is "unconstitutionally vague as applied to the conduct charged in the indictment" and that the evidence was insufficient to support the convictions. Pet. App. 14.[1] The court of appeals rejected those arguments and affirmed petitioner's convictions.

In rejecting petitioner's vagueness claim, the court explained that, although it agreed that the omnibus

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[1] Petitioner also made challenges to his conspiracy conviction, to some of the district court's evidentiary rulings, and to his sentence. Pet. App. 12-13. The court of appeals rejected those claims, *id.* at 24-33, and they are not renewed here.

clause of Section 1503 must be read "to avoid chilling vigorous advocacy" by criminal defense lawyers, no such concerns were raised on the facts of this case. Pet. App. 19. Petitioner had acted here not as a lawyer in a typical attorney-client relationship, but as a partner with Venezia in corrupt businesses that he sought to conceal from official scrutiny: "The government's theory of prosecution is predicated on the fact that [petitioner] held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of [Section 1503]." *Id.* at 16; see also *id.* at 26-27. The court emphasized that "it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest * * * that separates his conduct from that which is legal." *Id.* at 17; accord *id.* at 21, 27. The court concluded that its construction of "corruptly" was not "unconstitutionally vague as applied to the conduct" in this case. *Id.* at 19.

The court of appeals also held that the evidence was sufficient to support petitioner's convictions. It stated that the jury was entitled to conclude that petitioner's actions—including his institution of sham proceedings designed to disrupt the undercover FBI investigation, his fraudulent efforts to win Robinson's indictment, and his role in the filing of false motions and pleadings in Venezia's case—were corruptly motivated by his desire to stall the federal investigation and "safeguard his personal financial interest in the illegal gambling operation." Pet. App. 21.

The court separately rejected petitioner's "alternative argument that his attempts to persuade the local prosecutor to indict [Robinson] for misconduct are protected by the First Amendment." Pet. App. 22 n.11. Relying on this Court's precedent, it explained that

"meritless litigation based on false accusations and criminal intentions does not fall within the scope of protected speech and 'is not immunized by the First Amendment right to petition.'" *Ibid.* (quoting *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983)).

ARGUMENT

1. Petitioner contends (Pet. 10-19) that 18 U.S.C. 1503 does not reach the conduct for which he was convicted. The court of appeals correctly rejected that claim for reasons "limited to the specific facts of this case" (Pet. App. 23), and further review is not warranted.

a. The central thrust of petitioner's argument (Pet. 10) is that the court of appeals' decision exposes attorneys to prosecution for otherwise lawful and legitimate litigation conduct based solely on the showing of a "corrupt" motive. He further contends that such a motive means no more than an effort to "influence . . . the due administration of justice" (Pet. 14), and that this general standard "would cover most acts undertaken by lawyers" (*ibid.*). The court of appeals' decision does not reach that far.

The court of appeals emphasized that "[o]ur ruling today does not interfere with legitimate avenues of advocacy of even the most zealous of attorneys," Pet. App. 13, because it was limited to "corrupt endeavors to manipulate the administration of justice," *id.* at 18. The court observed that the district court correctly charged the jury that "[c]orruptly means to act with the purpose of obstructing justice." *Id.* at 15. Contrary to petitioner's suggestion (Pet. 14), such a purpose is not established merely by showing that an attorney representing a client attempted to win a case by legitimate,

lawful means. Rather, the purpose of "obstructing" connotes interfering with the lawful and proper disposition of a case. Normal advocacy does not fall within that concept.[2]

As the court of appeals observed, "[w]hatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case." Pet. App. 23. The question whether, in any particular prosecution, an attorney used the legal process for the purpose of obstructing, rather than advancing, the administration of justice thus depends on the facts. See *ibid.* ("our conclusion is limited to the specific facts of this case"). That determination does not raise a broad legal issue that warrants this Court's review. Nor does petitioner purport to identify such an issue. He does not specifically object to any instruction given

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[2] Petitioner argues (Pet. 15-16) that the limitations on the reach of its opinion noted by the court of appeals "provide no real bounds" to the decision. He claims that the corrupt-motive showing did not protect him because the jury was not asked to decide whether his purpose was to protect his own interests and the illegal gambling operation. Petitioner was charged and convicted, however, on the theory that he "held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute" (Pet. App. 16), and petitioner presents no claim here that he was denied, upon timely objection, a request for any particular instruction. Petitioner also suggests that a requirement of showing that a lawyer had the purpose of advancing his "personal financial interest" is not a limiting principle, because all lawyers have that, at least as to their fees. But the court of appeals' conclusion that it is corrupt for a lawyer to seek to protect his personal interests in an illegal business (see pp. 8-9, *infra*) gives no indication that it took a similar view of a motive to earn bona fide legal fees.

the jury.[3] He does not renew his claim, which the court of appeals rejected, that Section 1503 is unconstitutionally vague as applied to the conduct charged in this case. See Pet. i (Questions Presented). Nor does petitioner make clear in what particular respect the court of appeals may have misconstrued Section 1503 (or indicate how that claim was preserved below). He simply submits that "[t]he criminal justice system cannot function properly if attorneys are at risk of criminal prosecution for otherwise wholly lawful conduct, including the filing of briefs, whenever their motives may be questioned." Pet. 18. That broad policy-based statement does not warrant this Court's review.

b. In any event, on the facts of this case, there is no merit to petitioner's policy concerns about the application of Section 1503 to an attorney's litigation-related conduct. As the court of appeals found, petitioner's conduct fell far outside the range of acceptable professional representation of a client in numerous respects.

The court of appeals' affirmance of petitioner's convictions under Section 1503 rests on two considerations. First, the court stressed that petitioner was not simply (or even primarily) Venezia's "lawyer," but his partner in corrupt business enterprises. See Pet. App. 8-9, 16-17. The court repeatedly emphasized that what made Cueto's "nominally litigation-related conduct" unlawful was his motive "to safeguard his personal financial interest in the illegal gambling operation." *Id.* at 21;

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[3] Although he states that the jury "was never asked to decide" certain issues (*e.g.*, Pet. 16, 17), petitioner does not identify any proposed instruction that (in his view) the district court erroneously rejected, nor does he describe what relevant objections, if any, he preserved to the instructions that were actually given.

accord *id.* at 16-17, 27.[4] Petitioner was, therefore, not acting in the conventional role of a lawyer who is representing solely another person's interests. Second, the court also found it important that much of that "nominally litigation-related conduct" was itself "prohibited by the rules of professional responsibility and the canons of legal ethics," as confirmed by extensive expert testimony at trial (see 22 Tr. 1-114). Pet. App. 27; see, *e.g.*, *id.* at 18 (petitioner "file[d] papers in bad faith knowing that they contain[ed] false representations"), 21 (petitioner "file[d] frivolous appeals" and "false motions and pleadings"), 22 n.11 (petitioner engaged in "meritless litigation based on false accusations").

In short, contrary to petitioner's suggestion, the decision below does not subject "most lawyers" to "indictment and conviction" (Pet. 10), because "most lawyers" do not try to thwart criminal investigations through a pattern of misconduct (such as false and

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[4] Although petitioner suggests that he might not have been involved in the "underlying gambling/racketeering" crimes (Pet. 17), the court of appeals simply disagreed. A central theme of the government's case on Count 1 (see Indictment 1-24), as presented and argued to the jury, was that petitioner had a direct interest in the underlying illegal enterprises; the jury found petitioner guilty on that count, and petitioner does not challenge that conviction here. In passing, petitioner also expresses disagreement (Pet. 16) with the district court's order barring him from collaterally attacking Venezia's racketeering conviction. That issue is not properly before the Court, however, because petitioner did not raise it on appeal and, moreover, has not included any evidentiary issue as a question presented for review in this Court. See Pet. i. In any event, petitioner would have been free, in seeking to rebut the government's allegation of corrupt motive, to introduce any evidence that he himself was not implicated in illegal gambling activity.

frivolous filings) for the purpose of protecting their own direct financial interests in corrupt business activities. And petitioner does not identify any disagreement among the lower courts on the proper application of Section 1503 to a lawyer's litigation-related activity. What little authority exists on that issue is wholly consistent with the decision below, as petitioner appears to acknowledge. See Pet. 12; *United States* v. *Cintolo*, 818 F.2d 980, 993 (1st Cir.) ("[n]othing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. § 1503"), cert. denied, 484 U.S. 913 (1987).[5]

2. In the second question presented, petitioner challenges his conviction on Count 6 of the indictment on the theory that the First Amendment protected his efforts to obstruct the federal investigation by urging state prosecutor Robert Haida to indict federal investigator Bonds Robinson.[6] That claim is without

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[5] See also *Maness* v. *Meyers*, 419 U.S. 449, 470 n.19 (1975) (lawyer may be subject to contempt penalties where advice to client to plead Fifth Amendment is "given in bad faith" or is "patently frivolous or for purposes of delay"); *Cole* v. *United States*, 329 F.2d 437 (9th Cir.) (affirming conviction of lawyer under Section 1503 for corruptly encouraging client to plead Fifth Amendment), cert. denied, 377 U.S. 954 (1964); see generally *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992) ("Defense counsel is limited to legitimate, lawful conduct.") (internal quotation marks omitted); *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986) ("counsel's duty of loyalty" to client "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

[6] Petitioner suggests in passing (Pet. 23) that the First Amendment is relevant to certain "additional conduct" as well, such as his political and editorial activities. Any such claim would not be properly presented for this Court's review. The court of appeals treated petitioner's First Amendment claim, which he had included as part of his challenge to Count 6 (see Cueto C.A. Br. 28-

merit. As the court of appeals observed, petitioner's attempts to secure that indictment were "meritless," motivated by "criminal intentions," and based on "false accusations" against the investigator. Pet. App. 22 n.11.[7] The First Amendment does not protect false accusations made with the intent to obstruct an ongoing investigation. As this Court has held, "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, see *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983).

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32), as limited to "his attempts to persuade the local prosecutor to indict [Robinson] for misconduct." Pet. App. 22 n.11. Similarly, in his questions presented for review in this Court, petitioner confines his First Amendment challenge to his "efforts to persuade a local prosecutor to indict a state official for misconduct." Pet. i; see Sup. Ct. R. 14.1(a).

[7] In seeking Robinson's indictment, petitioner told State's Attorney Robert Haida that Robinson had taken a bribe from beer distributor Tony Joynt and had then lied about it under oath at a hearing in the State's prosecution of Venezia's customer George Vogt. Haida testified that, based in part on his discussions with Joynt, he concluded that petitioner's allegation was false (13 Tr. 113-114), that it "was an attempt by [petitioner] to manipulate or use my office to get at Robinson" (*id.* at 125), and that it was designed "to negate the federal investigation" (*id.* at 118). The government also introduced evidence at trial indicating that petitioner had fabricated a false account of how he supposedly learned about the non-existent bribe. See 8 Tr. 122-123. Petitioner is incorrect in claiming that the government "introduced no evidence whatsoever that Petitioner's complaint about Robinson was untrue, let alone that it was made with knowledge that it was baseless." Pet. 19-20.

Petitioner argues that *Bill Johnson's Restaurants* is distinguishable from this case on the ground that there the Court held that "the NLRB could not enjoin as an unfair labor practice a suit brought against an employee for a retaliatory motive unless the suit was also shown to be baseless or frivolous." Pet. 21 n.5 (emphasis omitted). But here the court of appeals did find that petitioner's statements to the local prosecutor were criminally motivated, "meritless," "misleading," and "false." Pet. App. 22 n.11. At bottom, petitioner disagrees with that fact-specific determination, which warrants no further review, and not with the court of appeals' articulation of First Amendment principles.

Similarly without merit is petitioner's attempt to present a conflict between this case and the Fifth Circuit's decision in *United States* v. *Hylton*, 710 F.2d 1106 (1983). In *Hylton*, the court found that the First Amendment protected the right of a taxpayer to file "a factually accurate, nonfraudulent criminal complaint" (*id.* at 1111) against agents of the Internal Revenue Service who had come onto her property without a warrant despite prominent "No Trespassing" signs. The court emphasized, however, that "a totally different result might follow" if the taxpayer's complaints had been "frivolous and based upon contrived allegations," *id.* at 1112, and other courts have distinguished *Hylton* on precisely that ground, *e.g.*, *United States* v. *Price*, 951 F.2d 1028, 1032 (9th Cir. 1991); see also *United States* v. *Citrowske*, 951 F.2d 899, 901 (8th Cir. 1991). Again, the "different result" in this case follows not from disagreement on any point of law, but from the court of appeals' factbound determination that petitioner's allegations were indeed "meritless," "false," and "misleading." Pet. App. 22 n.11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1999

(3)

No. 98-825

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Amiel Cueto submits this Reply to the Brief of the United States in Opposition to the Petition for a Writ of Certiorari. The government's Brief in this Court nowhere reflects that the Petitioner's conviction rests on his having filed a cert. petition in this Court that "attacked the integrity" of the Seventh Circuit, ~~nor~~ that he was sentenced for having "abused the First Amendment." This case is far more important than the government's papers suggest, and has implications for the practice of law throughout the United States.

Petitioner has sought certiorari on the question whether the omnibus clause of the obstruction of justice statute reaches any "endeavor," including quintessential litigation-related activities undertaken by a lawyer on behalf of a client, so long as the lawyer acted "corruptly." The Seventh Circuit, in this case and others, has defined "corruptly" very broadly, approving jury instructions that state that, to act "corruptly" the defendant's "main purpose" need not be "to obstruct the due administration of justice." The government has to establish only that "the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice." (Appendix to Petition for a Writ of Certiorari, hereafter "App.," at 15) Petitioner has argued that these definitions of the crime's actus reus and mens rea are too sweeping, and that the statute as construed, threatens the criminal justice system itself.

The government, in opposing certiorari, does not contend that the omnibus clause, as construed by the Seventh Circuit, does not reach litigation-related conduct, or that the Seventh Circuit in fact defined "corruptly" narrowly, thus avoiding potential criminalization of all litigation-related conduct. The government instead argues that the Court of Appeals upheld Petitioner's convictions for reasons "limited to the specific facts

of the case," and that further review is therefore not warranted.[1] (Brief of the United States, hereafter "Govt. Br.," at 6) The government is wrong. The decision of the Court of Appeals, and the construction of the omnibus clause that it endorses, extends well beyond the particular facts of this prosecution – as the participation of amici National Association of Criminal Defense Lawyers and Illinois Trial Lawyers Association demonstrates. In addition, the particular facts of this litigation underscore the dangers that an open-ended, ill-defined omnibus obstruction-of-justice clause presents to both the judicial system the statute is supposed to protect, and to the First Amendment, our nation's primary bulwark against abuses by all three branches of government.

The government argues that, "The question whether, in any particular prosecution, an attorney used the legal process for the purpose of obstructing, rather than advancing, the administration of justice ... depends on the facts." (Govt. Br. at 7) However, under our rule of law, facts must be evaluated in the context of a legal framework that gives fair notice of what is proscribed, and guides and constrains jurors in their application of the law to the facts. It does not suffice to assert, as the government implicitly does, that appellate courts can be counted

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[1] The government erroneously asserts that Petitioner does not seek review of his conviction for conspiracy. Though the conspiracy count alleged a "conspiracy to defraud the United States," as the petition for certiorari states, the alleged conspirational purposes and acts consisted of alleged obstructions of justice, which were also pled as separate substantive counts. (Petition for a Writ of Certiorari at 3) Petitioner submits that, if the convictions for obstruction of justice fail, then the conspiracy conviction would fail too. At the least, a remand would be required to consider the validity of the conspiracy conviction, in light of this Court's ruling on the obstruction of justice charges upon which it rests.

on to insure that no conviction for obstruction of justice will be upheld unless the attorney's conduct falls "far outside the range of acceptable professional representation of a client." (Govt. Br. at 8) The threat of prosecution is itself enough to chill zealous advocacy. Moreover, the Court of Appeals' affirmance in Petitioner's case itself refutes the proposition that convictions of attorneys for obstruction of justice will be possible only in clear-cut cases of attorney criminality. The Court of Appeals, after all, began its analysis by confirming the very limited role an appellate court plays in evaluating whether a conviction is supported by legally sufficient evidence. (App. 13)

Equally important, the critical factor upon which the Court of Appeals focused does not operate as a real limitation on the reach of the statute as it applies to lawyers. The Court of Appeals' decision suggests that Petitioner's conviction is valid because he was himself a criminally culpable participant in Venezia's gambling operations or racketeering enterprise, and his representation of Venezia thus protected his own illicit financial interests. The proffered limitation does not withstand scrutiny. While the prosecution did take the position that Petitioner had an interest in one tavern, Club Exposed, where Venezia had gambling machines, the evidence on this was disputed,[2] and, as the case went to the jury, this was not an essential aspect of the prosecution's case. The "financial motives" theory upon which this case was presented to the jury was much broader. As the Court of Appeals' decision reflects, most of the government's "financial motive" evidence went to showing, not that Venezia and Petitioner were partners in crime, but that they were partners in a variety of legal business ventures, which Petitioner did not dispute. (App. 8 & n.6) The government argued to the jury that Petitioner had an indirect

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[2] The government's proof was testimony of Venezia, Petitioner's former client, who had much to gain by turning on his lawyer.

interest – in the sense of concern with, not ownership stake in – the continuation of Venezia's gambling operations because those operations provided Venezia with funds to invest in lawful business ventures with Petitioner. The indictment specifically charged that theory, as the Court of Appeals recognized (App. 8-9); the government does not contend otherwise.[3] This case thus necessarily stands for the proposition that an attorney's indirect financial interest in a client's criminal ventures can supply a corrupt motive rendering the attorney guilty of obstruction of justice for legal work the attorney does on his client's behalf.

The government's related contention, that honest practitioners need not worry because much of Petitioner's litigation-related conduct was itself prohibited by the rules of professional responsibility and the canons of legal ethics, likewise provides no real restriction on the scope of the omnibus clause of the obstruction of justice statute. It ignores the specific conduct that the indictment charged as obstruction of justice: two counts based on the filing of pleadings and other court papers in federal proceedings and one based on Petitioner's efforts to persuade the local prosecutor to indict a liquor control agent (who was potentially a witness against his client) for giving false testimony.[4] Though the brief of the United States

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[3] The government does, however, insist that the Court of Appeals "simply disagreed" that Petitioner's financial interests were only indirect. (Govt. Br. at 9, n.4) That is to say, the Court of Appeals believed that Petitioner was guilty of gambling crimes. Surely, even if Petitioner had had a fair opportunity to defend against uncharged gambling crimes (which he did not), it would not be for the Court of Appeals to perform factfinding of this type.

[4] Whether or not Petitioner engaged in ethically questionable conduct in, for example, obtaining Bonds Robinson's presence at court proceedings so that Petitioner could

purports to summarize the charges in the obstruction counts, it does not even mention that one of the obstruction counts involved the filing of a petition for a writ of certiorari in this Court, which, according to the indictment, "attacked the integrity of the judges on the [Seventh Circuit] Court of Appeals." (Indictment, ¶ 32, 63-64)

On the second question Petitioner presents – that the First Amendment does have something to say about a criminal prosecution for complaining to a state prosecutor about claimed misconduct by a state law enforcement officer – the government, following the Seventh Circuit's lead, asserts that no First Amendment issue is raised because, as the Court of Appeals "found," Petitioner's complaint about the officer was false.[5] (Govt. Br. at 11-12) Even if the accusation against Robinson was false -- which remains disputed -- the constitutional question cannot so easily be avoided.

The Seventh Circuit law upon which this case was tried, and the conviction affirmed, allowed the jury to convict based on any "endeavor" with the capacity to obstruct justice, so long as it was performed with a corrupt motive. The jury was thus invited to convict Petitioner, even if it determined that his accusation against Bonds Robinson was true, as long as it found that the complaint was lodged for a corrupt purpose, such as discrediting Robinson as a potential witness.

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examine him under oath (see Govt. Br. at 3), that was not the conduct charged under the obstruction of justice counts, and could not have been, since no federal grand jury or court proceedings were then pending.

[5] According to the United States, "[H]ere the court of appeals did find that petitioner's statements to the local prosecutor were criminally motivated, 'meritless,' 'misleading,' and 'false'." (Govt. Br. at 12)

In arguing that no constitutional question is presented, the government relies on the Court of Appeals' post-hoc "finding" that Petitioner's accusation against Robinson was false.[6] But that

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[6] Petitioner argued on appeal that there was no evidence in the record sufficient to show that the charge against Robinson was false. The evidence as to whether Robinson took money from Joynt was as follows. Over defendant's hearsay objection, Haida was permitted to testify that he had a "conversation" with Joynt, asked Joynt if he had given money to Robinson, got an answer from Joynt, and "based on that answer," "did not believe that Bonds Robinson received money from Tony Joynt." (Tr. 13:111-13)

Neither Joynt nor Robinson testified. The government did not call either one to the stand, and defendant could not question them on the subject. Joynt asserted his Fifth Amendment privilege. Defendant could not examine Robinson on this subject, because of a pre-trial ruling that foreclosed efforts by the defense to "impeach" or attack Robinson.

The trial court's trial rulings also precluded defendant from introducing evidence to show that, whether or not Robinson had actually taken money from Joynt, Cueto had reason to believe that he had. Cueto was not allowed to testify that Joynt had told him that he had given Robinson money. Cueto was not allowed to testify that his law partner, Tom Daley, had told him that Joynt's wife had told Daley that her husband had given money to Robinson. Cueto was precluded from eliciting this from Daley too.

The Court of Appeals did not address the Petitioner's claim that the "evidence" of falsity was insufficient to support the conviction. It rejected Petitioner's claim that evidence as to the basis for Petitioner's actions was improperly excluded. (App. 29-30)

is itself a constitutionally impermissible basis on which to uphold the conviction. Even if, as the United States argues to this Court, there are no constitutional protections for false charges made against public officials,[7] nevertheless, there is a constitutional right to insist that the government carry the burden of proving falsity to the factfinders. Because no such proof was required, and no such finding was made by the jury, the Court of Appeals' decision can only be read to stand for the much broader proposition that any conduct, whether lawful or not, whether otherwise constitutionally protected or not, may form the basis for criminal obstruction of justice charges under the omnibus clause, if undertaken for a "corrupt" purpose, and that truth or falsity is irrelevant. When the omnibus clause of the obstruction of justice statute is used, as it was here, to prosecute conduct such as bringing official misconduct to the attention of the authorities, which is presumptively entitled to First Amendment protection, an important First Amendment question is presented.

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[7] Reckless disregard for the truth and "corrupt purpose" are not coterminous, so the existence of a corrupt purpose would not remove constitutional protection even for statements that are false.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

AMIEL CUETO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES PERMITTING THE GOVERNMENT TO PROSECUTE COUNSEL FOR LITIGATION-RELATED MISCONDUCT UNDER THE BROAD, CATCHALL PROVISIONS OF 18 U.S.C. §§ 371 AND 1503 VIOLATE A CLIENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Amiel Cueto's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Both petitioner and respondent have granted amicus NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

NACDL is a nonprofit corporation with over 10,000 attorneys and 28,000 affiliated members in all fifty states. The NACDL was founded in 1958 to advance the study of the theory and practice of criminal law, to publish on the subject of criminal practice, and to promote the integrity, independence and skill of the criminal defense bar. One objective of NACDL is to ensure that defense attorneys have the ability to provide zealous representation to their clients, as required by the Sixth Amendment to the United States Constitution. In particular, one of the concerns of NACDL is to ensure that defense

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[1]No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission.

counsel have the ability to aggressively and effectively represent their clients, without the threat of criminal prosecution under broadly drafted criminal charges. Otherwise, the government may use its prosecutorial discretion to chill zealous representation.

SUMMARY OF ARGUMENT

Our adversarial system of criminal justice requires the zeal and independence of both the prosecutor and defense counsel, as each has a specific function in the law's search for the truth. In performing their respective roles, counsel must have some flexibility, because "attaining the system's goal of accurately determining the guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and presentation of evidence." *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976). In part, the Sixth Amendment ensures the structural integrity of the criminal process by barring any "restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary process. . ." *Herring v. New York*, 422 U.S. 853, 857 (1975). These functions — what may loosely be described as "litigation-related conduct" — include not only all forms of courtroom advocacy, but cover the whole continuum of representation, from the early stages of a criminal investigation to the final phases of appellate litigation. *Cf. Buckley v. Fitzsimmons*, 509 U.S. 259, 272-74 (1993)(doctrine of absolute prosecutorial immunity extends to all phases of a prosecutor's role as an advocate of the state).

Yet, the right to counsel, as broad and important as it is, does not permit an attorney to commit unethical or unlawful acts in the defense of a client. When counsel crosses the line, there must be enforceable mechanisms of punishment. Indeed,

such mechanisms exist, ranging from attorney discipline and civil and criminal contempt, to criminal prosecution for perjury, tampering with witnesses and suborning perjury, and violations of the specific obstruction of justice provision of 18 U.S.C. § 1503. These are the specific and traditional vehicles to check an advocate's improper interference with the government's and the court's ability to perform their appointed functions.

Beyond this range, however, lie more general criminal statutes which arguably reach the same conduct, but are rarely invoked to punish and deter litigation-related misconduct. *Cf. Hubbard v. United States*, 514 U.S. 695, 714 (1995)("we doubt that prosecutors have relied on [18 U.S.C.] § 1001 as an important means of deterring and punishing litigation-related misconduct"). This fact, the very infrequency of their use, suggests the problem. By employing broader and stiffer[2] criminal statutes to prosecute defense attorneys for alleged litigation-related misconduct, the government improperly chills zealous advocacy. It is, in essence, a form of overcharging, i.e, bringing broader and more serious charges than necessary to obtain a fair disposition of the case. *See Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978)(Blackmun, J., dissenting). The effect of this new practice of overcharging is significant; it creates unacceptable risks for good faith, zealous advocacy, and injects larger unprecedented institutional pressures into the criminal justice system.

To maintain a healthy balance of vigorous advocacy in the adversarial system, charges against defense attorneys

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[2]The omnibus clause of section 1503 carries a 10-year statutory maximum, 18 U.S.C. § 1503(a)(3); whereas the other listed statutes impose a 5-year statutory maximum. *See infra* at 10.

should be limited to the specific and traditional statutory mechanisms to punish litigation-related misconduct. As a prophylactic rule, prosecutions relying upon broader, less traditional charges should be considered presumptively vindictive under the Sixth Amendment right to counsel and the Due Process Clause.[3]

REASONS FOR GRANTING WRIT

THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE TO THE CRIMINAL DEFENSE BAR, AND THE SEVENTH CIRCUIT'S OPINION IS DANGEROUS AUTHORITY IMPAIRING THE RIGHT TO ZEALOUS REPRESENTATION OF COUNSEL.

A. PROCEDURAL HISTORY

Petitioner Amiel Cueto was charged in a 35-page indictment, with conspiracy to defraud the United States under 18 U.S.C. § 371, with conspiracy to obstruct justice under the omnibus clause of 18 U.S.C. §§ 371 and 1503, and with substantive counts of obstruction-of-justice under the omnibus clause of § 1503.[4] In large part, the United States Attorney's Office prosecuted Mr. Cueto for improper advocacy on behalf of his principal client, Thomas Venezia, and several others.

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[3]Petitioner has standing to raise the Sixth Amendment and Due Process rights of his client, because a criminal defendant's right to zealous advocacy would be adversely affected if the government is permitted to prosecute counsel for alleged litigation-related misconduct under §§ 371 and 1503. *See generally Craig v. Boren*, 429 U.S. 190, 193-97 (1976).

[4]Among other counts, Mr. Cueto was acquitted of conspiracy to obstruct justice under § 1503.

Under the prosecution's theory of the case, Mr. Cueto filed groundless and false pleadings and briefs before state and federal courts, and before the United States Court of Appeals and this Court. Mr. Cueto was also accused of misrepresenting facts to a trial judge and securing a state court order by false pretenses.

In addition, the government alleged that Mr. Cueto filed appearances on behalf of clients, without their knowledge or consent, and represented several clients under a clear conflict of interest. The indictment also charged Mr. Cueto with improperly advising his clients not to cooperate with a federal grand jury and with giving unlawful advice to his clients. *Indictment,* ¶¶ 21, 24-25, 26(e), 26(f), 29-32, 36-39, 46-49, 57, 58. During summation, the prosecution told the jury that Mr. Cueto abused his position as an attorney to foil the investigation and prosecution of Mr. Venezia. RT 31-113. This litigation-related misconduct, the prosecution successfully argued, came within the sweep of 18 U.S.C. § 371, and the omnibus clause of 18 U.S.C. § 1503. Mr. Cueto was ultimately convicted of count 1 [conspiracy to defraud the United States], and counts 2, 6 and 7 [obstruction-of-justice charges] of the indictment.

B. CRIMINAL PROSECUTIONS UNDER THE CATCHALL PROVISIONS OF § 371 AND THE OMNIBUS CLAUSE OF § 1503 WILL CREATE SERIOUS AND UNACCEPTABLE RISKS FOR DEFENSE ADVOCACY.

Without question, §§ 371 and 1503 are two of the broadest statutes in the criminal code. Section 371, [5] for example, "is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." Likewise, the omnibus or residual clause of § 1503[6] is remarkable for its breadth; it applies to any improper endeavor which is likely to (but does not necessarily), interfere with a judicial proceeding. *United States v. Aguilar*, 515 U.S. 593, 601-02 (1995); *see* App. 17 (omnibus clause is interpreted broadly). What is more, the government here widened the dimensions of the obstruction-of-justice prosecution by charging it as a conspiracy.[7] *See Grunewald v. United States,* 353 U.S. 391, 404 (1957)("We will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of

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[5]Section 371 reads, in relevant part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this Title or imprisoned not more than five years, or both."

[6]The omnibus clause of § 1503 states: "Whoever. . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

[7]*Indictment*, ¶¶ 76-87.

conspiracy prosecutions.").

Such a sprawling prosecution sends out an ominous message to the defense bar and puts attorneys in a very precarious situation. In the often hurried, unpredictable and emotionally-charged drama of criminal litigation, defense attorneys now walk a razor's edge: they must zealously represent their clients as the Sixth Amendment requires, but must do so with the ever-present worry of their own criminal liability under broadly drafted charges. *Cf. Imbler v. Pachtman*, 424 U.S. at 429 ("Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation.").

The significance of this brand of prosecution cannot be overstated. Under a conspiracy theory or similarly broad charge, an attorney's innocent or inadvertent act, when viewed in larger context, may appear as part of a criminal enterprise. *Badders v. United States*, 240 U.S. 391, 394 (1916)(a facially innocent act may be found to be one step in a criminal conspiracy). Under the government's virtually unreviewable charging powers, defense attorneys would be subject to ill-defined and open-ended prosecutions for real and apparent misconduct. *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L. J. 405, 409-12 (1959)(discusses difficulties in defending § 371 charges).

This is not simply an abstract concern, as demonstrated by the position the United States Attorney's Office took in this case. Here, the government argued during summation that several of petitioner's litigation-related acts (which were indictable under the specific and traditional statutes) were somehow part of an overarching scheme to defraud the

Government under § 371, and to obstruct justice under § 1503:

> Cueto used his law license like he had an Uzi in his pocket.
>
> So if a false court order had to be filed in court of law, it had to be done.
>
> So if a false pleading had to be filed to derail a federal grand jury, it had to be done.
>
> So if a federal judge needed to be gotten rid of through disqualification, it had to be done.
>
> So if a false motion had to be filed to discharge the federal grand jury investigating Tom Venezia, it had to be done.
>
> So if the federal investigation and prosecution of Tom Venezia had to be impeded and obstructed, it had to be done.
>
> So if Amiel Cueto had to violate every ethical rule in the book to accomplish the fraud on the Government, it had to be done.
>
> And the sole justification, ladies and gentlemen, is the Attorney Amiel Cueto, armed with his law license and his political power, is the zealous advocate for Tom Venezia, a racketeer and a criminal.[8]

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[8]RT 31-8, 31-9.

C. THE SEVENTH CIRCUIT'S UNCONDITIONAL APPROVAL OF OPEN-ENDED PROSECUTIONS AGAINST DEFENSE ATTORNEYS IS UNSOUND AND DANGEROUS.

In its opinion, the lower court agreed with some of amicus's policy concerns and arguments, but nonetheless rejected them in favor of broad prosecutorial discretion:

> We have carefully examined the fears articulated by the National Association of Criminal Defense Lawyers, in addition to the arguments put forth by the defendant, that a decision upholding the application of the omnibus clause of § 1503 to litigation-related conduct may deter or somehow chill the criminal defense lawyers in zealous advocacy, and we find those concerns to be exaggerated, at least as considered in light of the facts in the present case. Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer's misconduct and criminal acts are not *absolutely immune* from prosecution....

App. 19 (emphasis added).

While correctly identifying certain aspects of amicus's position, the lower court misunderstood the most fundamental part. Specifically, amicus did not then, nor does it now, propose a rule of absolute immunity for prosecutions against attorneys for their litigation-related misconduct. Amicus's

approach assumes an attorney's liability, criminal or otherwise, for misconduct committed in his professional capacity. Such liability, however, would presumptively be limited to the specific and traditional punitive measures.

The list of these acceptable measures includes: the various forms of attorney discipline, *see* ABA Code of Professional Responsibility, various contempt sanctions, Fed. R. Crim. P. 42, 18 U.S.C. § 401, and prosecutions for false claims against the United States, perjury, subornation of perjury, witness tampering, false declaration before jury or court, 18 U.S.C. §§ 287, 1621, 1622, 1623. Even the three specific provisions under the obstruction-of-justice statute, 18 U.S.C. § 1503,[9] serve as specific and effective methods to punish litigation-related misconduct. *See Hubbard*, 514 U.S. at 714 (discusses array of available statutes to penalize false statements).

In reaching its decision, the Seventh Circuit relied heavily upon the First Circuit's holding in *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987). *See* App. 17, 19. *Cintolo* is unpersuasive for several reasons. In *Cintolo*, the defendant, a practicing criminal defense attorney, was charged with one count of conspiracy to obstruct justice, 18 U.S.C. §§ 371, 1503, and two substantive counts of the same offense. The gist of the prosecution was that Cintolo purposefully impeded the grand jury investigation of his friend's (Anguilo) illegal gambling and loansharking business. Specifically, the indictment accused Cintolo of abusing his position as an attorney of record for a witness before a grand jury to obtain information for Anguilo

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[9] *See United States v. Aguilar*, 515 U.S at 598 (discusses structure of § 1503, containing three specific provisions and the one omnibus clause).

about the grand jury investigation. Cintolo was further charged with knowingly assisting Anguilo in his efforts to prevent the witness from testifying truthfully or cooperating in any way with the government. Cintolo was convicted of the charges, and the First Circuit affirmed.

The Seventh Circuit's reliance upon *Cintolo* was ill-advised for several reasons. First, in the present case, amicus did not argue for a rule of absolute immunity, as the defendant and its amici did in *Cintolo*. In *Cintolo*, the defendant and amici maintained that absolute immunity should apply to litigation-related conduct, so long as these acts had a facially valid justification. Amicus here, on the other hand, assumed a defense attorney's criminal liability under traditionally invoked statutes for actual litigation-related misconduct (a question of fact for the jury), but challenged the application of the broader catchall provisions of 18 U.S.C. §§ 371 and 1503.

As a result, the First Circuit's exclusive focus in *Cintolo* on the importance of the jury's fact-finding function did not apply here. *Cintolo* emphasized that a blanket immunity for acts committed during defense representation would strip the jury of its paramount role. *Cintolo*, 818 F.2d at 991. Here, no such blanket immunity was sought. Under the rule proposed here, attorneys would still be subject to prosecution under mechanisms traditionally used, with a jury fulfilling its fact-finding function in these criminal prosecutions.

But even if this distinction were not present, this Court should grant certiorari to correct the erroneous and dangerous precedent created by the Seventh Circuit here as well as by the First Circuit in *Cintolo*. To allow the government unbridled discretion to prosecute attorneys under any applicable criminal statute for alleged misconduct committed during core advocacy

creates ominous risks for counsel. As discussed above, the threat of criminal prosecution in its own right carries with it an unacceptable chill on vigorous advocacy. This is true whether or not defense counsel is ultimately convicted. Consequently, in closely-balanced and high profile cases, many defense counsel may decide not to tack too close to the political winds, lest they themselves become the subject of criminal prosecution. *Cf. Imbler*, 424 U.S. at 426 n.24 ("A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where acquittal likely would trigger a suit against him for damages.").

Apart from increasing counsel's criminal exposure, a prosecutor also immeasurably complicates a trial and greatly burdens the defense by invoking catch-all statutes, such as §§ 371 and 1503. Fundamentally, a prosecutor's ability to admit relevant evidence broadens as do the charges. As a result, what ought to be a narrow evaluation of the evidence offered to prove specific litigation-related acts, now becomes an expanded contextual examination of all seemingly related conduct of both counsel and his defendant/client(s).

Of course, similar problems face all defendants charged under broad statutes. But these concerns are acutely prejudicial to an attorney prosecuted for acts committed in his professional capacity. In a typical prosecution involving two or more defendants (or unindicted co-conspirators), the government must prove the association of the defendants to make its case, an often difficult proof problem. But the association between counsel and his client inheres in the attorney/client relationship

itself. In defending against an open-ended prosecution for acts committed in her professional capacity, an attorney must concede what the Sixth Amendment requires -- a close working relationship with his client. Thus, by indicting both the client and counsel (as was the case here), a prosecutor can, with ease and great effect, exploit the attorney's "guilty" association with his defendant/client to paint a very dark portrait of counsel. Whether through the use of its unlimited charging power or through artful employment of evidence, the government's ability to secure a conviction for specific litigation-related misconduct is greatly enhanced when prosecuted under the catch-all provisions of §§ 371 and 1503.

Under a narrower and more defined prosecution, the government's focus would necessarily be limited to counsel's specific litigation-related conduct. The Seventh Circuit's holding, however, would permit the government to make the attorney/client relationship a principal theme of the criminal prosecution.

Thus, this Court should grant certiorari to decide whether the Seventh Circuit's opinion improperly impacts on the constitutional right to effective assistance of counsel.

D. OPEN-ENDED PROSECUTIONS AGAINST DEFENSE ATTORNEYS FOR THEIR PURPORTED LITIGATION-RELATED MISCONDUCT SHOULD BE CONSIDERED PRESUMPTIVELY VINDICTIVE.

As discussed above, the government has a wide range of specific punitive measures to prosecute defense counsel for litigation-related misconduct. To invoke broader and stiffer measures to punish the same conduct gives rise to an appearance of vindictive prosecution. Thus, open-ended prosecutions should be considered presumptively vindictive.

"In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. at 364. Yet, "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Id.* at 365.

In *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), this Court found a due process violation where a judge, without explanation, imposed an increased sentence on a second conviction, after a defendant had successfully challenged his first conviction. In *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), this Court applied *Pearce* to prohibit a State from using its prosecutorial powers to punish a defendant for successfully attacking a conviction. This Court later reasoned that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most

basic sort . . .'." *United States v. Goodwin*, 457 U.S. at 372. This prophylactic limitation on prosecutorial discretion, familiarly known as vindictive prosecution, requires a complex and difficult inquiry into the state-of-mind of the individual prosecutor and/or his agency. As such, this Court has refined the doctrine by applying a presumption of vindictiveness, where the specific circumstance and posture of the criminal prosecution suggest a "reasonable likelihood of vindictiveness":

> This imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity. Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. Given the severity of such a presumption, however — which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct — the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

Id. at 372-73.

The question in the present petition is whether the institutional pressures animating the presumption of

prosecutorial vindictiveness in *Blackledge* exist to the same or greater degree in this and other open-ended prosecutions against defense attorneys for their litigation-relation misconduct. *See Scott v. United States*, 419 F.2d 264, 277-79 (D.C. Cir. 1969)(courts should evaluate the overall context of a prosecution and its charges to determine whether prosecutorial discretion has been fairly and justly exercised). For one, a prosecution against a typical defendant stands in sharp contrast to one involving an attorney. The *threat of* or actual filing of an indictment against an attorney for acts committed during the core representation of a criminal defendant implicates the right to counsel in a way that a charge against any other defendant does not. And, it is the *threat*, alone, which imposes a significant although immeasurable chill on the defense bar. *Cf. Hubbard v. United States*, 514 U.S. at 717 (Scalia, J., concurring)(threat of prosecution against attorneys under § 1001 may carry unacceptable risks to the adversarial system).

The Seventh Circuit's brief response to this problem is incomplete. In that court's view, the criminal statutes themselves made the illegality of an attorney's litigation-related conduct self-evident:

> It is undisputed that an attorney may use any *lawful* means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of the lawful conduct. However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto's otherwise legal conduct, that separates his conduct from

that which is legal.

App. 17. But not all litigation-related misconduct, or even more general criminal conduct for that matter, falls so neatly into clearly demarcated areas of criminal and non-criminal behavior. Indeed, the Seventh Circuit correctly acknowledged that there was scant case law on whether litigation-related misconduct came within the reach of the omnibus clause of § 1503.[10]

This aside, many criminal prosecutions turn upon the subjective state-of-mind of the defendant. In such cases, the jury's perception of the credibility of the defendant (in this case a defense attorney who represented a criminal defendant), becomes the central aspect of the case. Tainted by her association with the client, counsel's zealous, but good faith, advocacy may appear to a jury as criminal wrongdoing. To be sure, in representing criminal defendants, counsel may decide to err on the side of caution by avoiding controversial defenses or procedures; or, in a more general sense, by muting the overall presentation of the defense. But does the Sixth Amendment contemplate this compromised effort from defense counsel? Amicus submits that defense counsel's fear of criminal exposure under open-ended charges for specific acts committed in his professional capacity exacts too high a toll on the adversarial system of justice.

Thus, amicus's proposed prophylactic rule struck a

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[10]In fact, the Seventh Circuit observed: "There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation-related conduct that results in an obstruction of justice." App. 16.

necessary balance between the public's interest in punishing misconduct and the Sixth Amendment value in preserving good faith, zealous advocacy. Given the vast arsenal of traditional punitive measures at its disposal, the government's use of broad, infrequently-invoked charges to punish litigation-related misconduct creates "the likelihood of vindictiveness," justifying a presumption of an improper prosecution. *Goodwin*, 457 U.S. at 376. In short, the prosecution should be required to offer a persuasive explanation for the need to prosecute specific litigation-related conduct under broad and infrequently employed charges. *Cf. Wasman v. United States*, 468 U.S. 559, 569 (1984)("where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness").

CONCLUSION

For the foregoing reasons, NACDL urges this Court to grant the writ of certiorari to address the important issues presented.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMIEL CUETO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE

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QUESTIONS PRESENTED FOR REVIEW

1. Can a lawyer be convicted under the omnibus clause of the obstruction of justice statute, 18 U.S.C. §1503, for filing false pleadings and court papers on behalf of a client?

2. Can a lawyer be convicted under the omnibus clause of the obstruction of justice statute, 18 U.S.C. §1503, for petitioning a state prosecutor in two written letters and the publication of an editorial opinion, to bring a corrupt public official to justice?

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BRIEF OF AMICUS CURIAE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE ILLINOIS TRIAL LAWYERS ASSOCIATION (ITLA) files this amicus brief pursuant to this Court's Rule 37.2 (a) in support of Amiel Cueto's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Both petitioner and respondent have granted amicus ITLA consent to file this brief and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

The Illinois Trial Lawyers Association is a statewide organization whose members specialize in representing injured consumers and workers. Founded in 1952, the organization currently has 2,300 members. The objects of ITLA shall be to: uphold the Constitution of the United States of America and the State of Illinois; secure and protect the rights of those injured in their persons or civil rights; defend trial by jury and the adversary system of justice; strive to achieve and maintain high standards of professional ethics, competency and demeanor in the bench and bar; promote fair, prompt and efficient administration of justice; and educate and train in the art of advocacy.

STATEMENT OF THE CASE

In a 35 page indictment Attorney Amiel Cueto was charged with conspiracy to defraud the United States (18 U.S.C. § 371) and violating the omnibus clause of the obstruction of justice

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1 No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than ITLA and its members, made any monetary contribution to its preparation or submission.

statute (18 U.S.C. § 1503). Although acquitted of some charges, he is serving an 87 month prison sentence for what was essentially aggressive lawyering.

The crime, according to Count 2 of the indictment, was filing "false pleadings".

Cueto obtained a state court injunction on behalf of his client Tom Venezia against a liquor control official. The case was removed to the Federal District Court where the order was vacated.

Cueto's "crimes" occurred during the appeals process and were three-fold.

First, he characterized his client as an "honest citizen" (at a time when the man had neither been charged nor convicted of any offense). Second, he alleged in a petition for writ of certiorari to this court that the local state's attorney was aware of the procedure used to summon the agent to court. Third, he allegedly attacked the integrity of the Seventh Circuit Court of Appeals in affirming the lower court.

In Count 6, Cueto's "crimes" were in authoring two letters to the same state's attorney advocating the investigation of the same liquor control agent (Bonds Robinson) for perjury; and for authoring a newspaper editorial where he opined that Robinson did commit perjury. At Cueto's trial no evidence of the agent's alleged perjury was permitted (Robinson never testified).

Hence, a lawyer stands convicted for criticizing an allegedly corrupt government informant, all on behalf of his client, and with no regard for whether the "speech" was true or false.

Venezia was eventually charged and convicted of racketeering. Cueto did not represent Venezia in this case. In Count 7 his "crime" apparently again involved false pleadings in authoring a "model" motion to disqualify the Venezia trial judge under 28

U.S.C. § 144 and 455. The lawyer who filed this "motion" never testified in Cueto's trial and so the "falsity" of this pleading remains unknown.

Counts 2, 6 and 7 charge violations of the omnibus clause of 18 U.S.C. § 1503. Together they form the basis for Count 1 – conspiracy to defraud the United States (18 U.S.C. § 371).

Zealous advocacy? Yes! Crimes? No!

SUMMARY OF ARGUMENT

For the first time in the history of American jurisprudence a lawyer has been sent to prison for doing his job. According to the Seventh Circuit Court of Appeals, "litigation related conduct" such as drafting and filing pleadings and petitioning a state prosecutor to investigate and charge a government informant constitutes obstruction of justice (18 U.S.C. § 1503) and conspiracy to defraud the United States (18 U.S.C. § 371).

How can the members of the Illinois Trial Lawyers Association "secure and protect the rights of those injured in their persons or civil rights" if the "art of advocacy" becomes a crime?

The Seventh Circuit would assure us that lawful advocacy is not a crime unless done with a corrupt motive. But *United States v. Cueto* holds financial self interest may supply the corrupt motive; and, by invoking traditional proximate cause analyses, it further holds that this motive need only be *a* motive in the litigation related conduct.

Most lawyers who represent "the rights of those injured in their persons" do so on a contingent fee basis. The object of their representation is to maximize their client's recovery. The more they get their client, the more they get themselves. The statute allowing tort claims against the United States approves a contingent fee contract. Undeniably, the lawyer's financial self interest is *a* motive in all of these cases.

If a lawyer files a civil complaint for damages against the United States in a federal tort claims case, and the allegations turn out to be wrong (false?), can the lawyer be prosecuted for obstruction of justice or conspiracy to defraud the United States?

It is hard to say because according to *United States v. Cueto*, "whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case by case." (Petitioner's Appendix at p. 23).

Respectfully, a "case by case" approach to the question of when an aggressive lawyer becomes a criminal is simply not acceptable, especially given all of the existing tools available to punish and deter abusive advocacy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

THE SEVENTH CIRCUIT'S OPINION EXPOSES LAWYERS TO AN UNREASONABLE RISK OF CRIMINAL PROSECUTION FOR AGGRESSIVE ADVOCACY AND THE "CORRUPT MOTIVE" ELEMENT AS DEFINED IN THE OPINION OFFERS NO PROTECTION

Amiel Cueto was neither charged nor convicted of racketeering or gambling. If Cueto had been so charged and convicted, then ITLA "wouldn't have a dog in this fight." The Seventh Circuit justifies Cueto's conviction by suggesting he was a participant in Venezia's underlying criminality. In fact, the jury was never asked that question and they certainly never gave that answer.

The inescapable conclusion is that Cueto was charged and convicted under two of the broadest statutes in the criminal code for doing what lawyers do – drafting, filing or suggesting the filing of pleadings, and attacking the credibility of an opponent's witness.

This is dangerous precedent for lawyers and their clients. Day in and day out lawyers attack each other's pleadings. Plaintiff's lawyers are charged with filing groundless complaints; defense lawyers with filing unsupported denials. Abusive discovery practices are all too common. Many times the lawyer's financial self interest is certainly *a* motive, and according to *United States v. Cueto* a "corrupt motive" sufficient to violate 18 U.S.C. § 1503.

At the heart of our legal system is the premise that zealous advocacy, on both sides, even when motivated in part by financial self interest will achieve justice, not obstruct it. In this case there is simply no protection for aggressive advocacy if some element of financial self interest can lead a jury or fact finder to believe that sharp lawyering is really an "endeavor" to obstruct the "due administration of justice" and thus violate the omnibus clause of § 1503.

A lawyer will now think long and hard before filing a medical malpractice case against a hospital whose president happens to be married to a United States Attorney.

What if that same hospital misrepresents the circumstances of the patient's death to the local coroner to avoid an inquest?

If the patient's family lawyer advocates an investigation by the state's attorney as part of his strategy in prosecuting the medical malpractice claim (to maximize the value of the case and consequently maximize his fee), Count 6 in *United States v. Cueto* may subject the lawyer to criminal prosecution. The real loser is the client.

Criminal prosecution is not the only threat. Lawyers will find themselves as defendants in civil R.I.C.O. actions with punitive damage exposure.

Obstruction of justice (18 U.S.C. § 1503) is a predicate act under 18 U.S.C. § 1962 et. seq. If a lawyer's adversary believes

he has filed false pleadings (for example, a motion for sanctions seeking to strike an opponent's answer), and success on the motion results in a larger verdict (and fee), then the "corrupt motive" is present for the predicate act (obstruction of justice) and the R.I.C.O. action.

More fundamentally, *United States v. Cueto* strips lawyers of their First Amendment right to criticize government officials and petition proper authorities for redress. The Seventh Circuit's statement that Cueto's reports and his editorial opinions about Robinson do not enjoy "even a colorable claim to First Amendment protection" is simply wrong. See, for example, *Branzburg v. Hayes*, "[F]reedom of the press is a fundamental personal right which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 408 U.S. 665, 704 (1972)

This case has created the anomalous result that statements made in pleadings and briefs are absolutely immune from civil defamation suits for fear of chilling advocacy; (*Ash v. Zwietusch*, 159 Ill. 455, 42 N.E. 2d 854 (1896); *Bleaker v. Drury*, 149 F.2d 770 (2nd Cir. 1945)), but are punishable under the criminal code.

POINT II

ADEQUATE PROTECTIONS ALREADY EXIST AGAINST ABUSIVE LITIGATION RELATED CONDUCT WITHOUT RESORTING TO 18 U.S.C. § 371 AND 1503

The Illinois Trial Lawyers Association echoes and supports the lower court's pronouncement that "lawyer's misconduct in criminal acts are not absolutely immune from prosecution."

Lawyer misconduct should be subject to the greatest scrutiny, and it is.

Lawyers are subject to professional discipline, including disbarment. They are subject to civil and criminal contempt. Sanctions lie under Rule 11 of the Federal Rules of Civil Procedure, along with related provisions of state law.

Furthermore, lawyers are also subject to the same criminal laws as any other citizen. Cueto was subject to the same racketeering and gambling statutes as was Venezia. The problem is that Cueto was never charged or convicted of violating these statutes, nor was he charged or convicted of suborning perjury, knowingly destroying critical evidence or threatening a witness, conduct all specifically prohibited by the criminal code.

Instead, the Seventh Circuit has armed the United States Attorney with a dangerous *new* weapon to chill and punish aggressive lawyering, and they admit they did so with virtually no precedent. "There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation related conduct that results in an obstruction of justice." (Petitioner's Appendix at p. 16)

The court's reliance on *U.S. v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) is clearly misplaced. In the first place, the facts are distinguishable. More importantly, the defendant's conduct in that case amounted to witness and evidence tampering – conduct for which specific criminal code provisions exist.

Here, to imprison Cueto, the government was forced to resort to the non-specific clause of § 1503 to criminalize zealous advocacy.

If this remains the law of the land, then organizations such as ITLA will be forced to dramatically rethink how its members can "secure and protect the rights of those injured in their persons or civil rights."

CONCLUSION

Practicing law is difficult. *United States v. Cueto* now makes it dangerous. The Illinois Trial Lawyers Association asks this Court to grant the writ of certiorari.

RESPECTFULLY SUBMITTED,

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